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CASE NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1985

JERRY B. SCHREIBER,
Personal Representative
of the
ESTATE OF
THEADORES W. ROSS,
Petitioner,

vs.

CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether Petitioner, the Estate of an elderly person defrauded of her property, has been deprived of real property, and due process as guaranteed in the Fifth and Fourteenth Amendments of the Constitution of the United States by the Judgment of the Supreme Court of Florida reversing a Decision of the Florida Third District Court of Appeal, sitting en banc?

II

Whether the Supreme Court of Florida improperly usurped the power of the Legislature when it removed the common law protection in the conveyance of real property?

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PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT
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FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Florida entered on August 30, 1985, in the above-entitled Cause.

OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at 479 So.2d 90, and is printed as Appendix A. This is an opinion on rehearing after CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION (hereinafter known as CHASE FEDERAL), Petitioner below, filed a Motion for Rehearing which was granted. CHASE FEDERAL'S Motion for Rehearing is printed in Appendix F, infra. SCHREIBER, Respondent below, timely filed a Response to CHASE FEDERAL'S Motion for Rehearing. This Response is printed in Appendix G.

The Opinion of the Supreme Court of Florida dealt with two separate and distinct issues: (1) the proper scope of Review for en banc proceedings for intermediate appellate courts in the State of Florida, and (2) the merits of

the instant case, whether a deed given to a non-relative in return for "love and affection" is without consideration and is invalid. On Rehearing, the only issue raised by CHASE FEDERAL was the issue on the merits. The Opinion and Decision of the Supreme Court of Florida, entered on August 30, 1985, Appendix A, held that there does not need to be consideration in order for an owner of land to convey it by deed to another person.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on August 30, 1985, Rehearing denied January 2, 1986, Appendix C. Jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(3), Petitioner having asserted in the Courts below rights, privileges, and immunities con-

ferred by the Constitution and Laws of the United States.

How The Federal Questions Were Presented.

The Judgment of which review is sought is the Judgment of the Supreme Court of Florida in which that Court determined the validity of a deed to real property with the stated consideration being "love and affection" between two parties who were not related by blood or marriage.

In substance, the allegations before the Supreme Court of Florida, insofar as pertinent to the Jurisdiction of this Court, were that Petitioner had been denied constitutional rights guaranteed by the Fifth and Fourteenth Amendments in that the Supreme Court of Florida, both expanded the meaning of a

1968 Amendment to the Constitution of the State of Florida, and heard, for the first time in this Cause, an issue raised by the Respondent which it had not raised in any of its prior pleadings or any proceedings below, other than on Rehearing before that Court (Appendixes E, F, and G).

How Federal Questions Were Disposed Of.

The Supreme Court of Florida denied SCHREIBER'S Motion for Rehearing on January 2, 1986 (Appendix C).

Although the Supreme Court of Florida did not expressly rule on SCHREIBER's federal constitutional rights, it nevertheless so disposed of these allegations as to confer Jurisdiction upon this Court. Actual determination by the State Court of the federal question in specific terms is not

required. Lawrence v. Mississippi, 286 U.S. 276, 282, 52 S.Ct. 556, 76 L.Ed. 1101 (1932), Dorchy v. Kansas, 272 U.S. 306, 308-309, 47 S.Ct. 86, 71 L.Ed. 248 (1926), Dewey v. DesMoines, 173 U.S. 193, 199, 19 S.Ct. 379, 43 L.Ed. 665 (1899). Moreover, the fact that a Decision purports to rest upon State grounds does not preclude this Court from deciding whether federal constitutional rights were in fact denied. Williams v. Georgia, 349 U.S. 375, 75 S.Ct. 814, (1955); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681-682, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); Davis v. Wechsler, 263 U.S. 22; 44 S.Ct. 13, 68 L.Ed. 143 (1923); and Rogers v. Alabama, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1904).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article X, Section 4(c) of the Florida Constitution, as revised in 1968, provides in pertinent part:

> "The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift...."

Article II, Section 3 of the Florida Constitution, as revised in 1968 states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Florida Statutes, § 2.01 (1983) states:

> The common and statute laws of England which are of a general and not a local nature, with the

> exception hereinafter mentioned, down to the 4th Day of July, 1976, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

STATEMENT OF THE CASE

The uncontroverted facts reflect that Peter Cournoyer, a roofer, induced Theadores W. Ross, a lady 90 years of age, to transfer title in her home to him by a Quit Claim Deed, which stated that "[T]his Quit Claim Deed is being given with the consideration being 'love and affection'". The deed was recorded with a minimum amount of documentary stamps affixed. Cournoyer then sold the property to Luis and Gladys Perez for $50,000.00. The Perezes obtained the major portion of the purchase price from the mortgage proceeds supplied by CHASE

FEDERAL SAVINGS AND LOAN ASSOCIATION. The Perezes proceeded to close the transaction without a lawyer, asserting that they were relying on CHASE FEDERAL and its lawyers in closing the transaction.

After Cournoyer sold the property to the Perezes, Ross sought to cancel her deed to Cournoyer, Cournoyer's deed to the Perezes, and the Perezes mortgage to CHASE FEDERAL, on the ground that the original deed to Cournoyer was void for lack of consideration (Appendix D). The Trial Court found "There was no consideration for the execution of...[The Deed to Cournoyer] with the exception of love and affection and therefore equitable title and interest in the subject property remained in Ross". The Trial Court concluded, however, that "legal title did pass" from Cournoyer to

the Perezes because the Perezes were "bona fide purchasers having paid a valuable consideration without notice of any infirmity, and, therefore, their title to the subject property and interest in the subject property respectively shall stand." Finally, the Trial Court, holding that a Constructive Trust arose for the benefit of Ross in the proceeds of the sale received by Cournoyer in the sale to the Perezes, entered a Judgment for Ross against Cournoyer in the amount of $50,000.00.

Ross appealed the Trial Court's denial of her claim for cancellation of the deeds and mortgage, asserting that the Perezes, as purchasers, and CHASE FEDERAL, as mortgagee-holder, did not have valid interest in the property because there was notice on the face of

the deed to Cournoyer that the consideration was legally insufficient. Therefore, Ross contended, the Perezes were not bona fide purchasers for value without notice and CHASE FEDERAL could not claim a valid mortgage on the property. In a Rehearing en banc before the District Court of Appeal, Third District Florida, a majority of the en banc Court considering the Cause on the merits, reversed the Trial Court, reported at 422 So.2d 911 (Fla. 3d DCA 1982), holding that under the District Court's prior decision in Florida National Bank and Trust Co. v. Havris, 366 So.2d 491 (Fla. 3d DCA 1979) a deed given to a non-relative in return for love and affection is invalid for lack of consideration. In so holding, the District Court found that the Perezes and CHASE FEDERAL were on

notice to make inquiry concerning the propriety of Ross's deed to Cournoyer since the only consideration reflected was "love and affection". The District Court then remanded the cause with directions to cancel the deed to Cournoyer and the Perezes, and the mortgage to CHASE FEDERAL.

CHASE FEDERAL, the mortgagee, timely appealed this Decision to the Supreme Court of Florida. The Perezes filed an untimely appeal and their appeal was dismissed for lack of jurisdiction, Rehearing denied as reported in 443 So. 2d 980 (Fla. 1983). The Perezes, never parties below, attempted to intervene in this Cause and as recently as March 6, 1986, the Supreme Court of Florida denied their attempt to intervene (Appendix I).

The unofficial Opinion and Decision of the Supreme Court of Florida

rendered on July 26, 1984 and withdrawn on August 30, 1985, by the Court (Appendix B cited at 9 FLW 313 (Fla. July 26, 1984) stated in part, that "A deed given to a non-relative in return for 'love and affection' is without consideration and is invalid".

CHASE FEDERAL filed its Motion for Rehearing (Appendix F). SCHREIBER, in his timely response (Appendix G) specifically and timely pointed out to the Court that CHASE FEDERAL'S only viable issue on Rehearing had <u>never</u> been raised in any of the prior proceedings (See Appendix A, the dissent of Mr. Justice Overton, and Appendexes G and E), and in accordance with precedent from the Supreme Court of Florida, this issue on Rehearing should <u>not</u> be considered by the Court (Appendix G).

However, on August 30, 1985, the Supreme Court of Florida reversed itself and held that because of Article X, Section 4(c) of the 1968 Revision to the Florida Constitution, no consideration is required for the conveyance of real property (Appendix A). In his Motion for Rehearing, SCHREIBER (Appendix H) specifically raised the following points:

(1) That the majority of the Court, through its Decision, was legislating new law contrary to the doctrine of separation of powers and its own authority under the Florida Constitution; and

(2) That the Court's interpretation of Article X, Section 4(c), is contrary to the intent of the framers of this Amendment; and

(3) That the Court, by deciding the merits of this Cause, on an issue never presented nor addressed by the Trial Court, the District Court of Appeal, or the Supreme Court of Florida in the First Appeal is violating SCHREIBER'S entitlement to procedural due process as guaranteed by the Fifth and the Fourteenth Amendments. Furthermore, the action of the Court in considering a new issue raised for the first time on Rehearing in the Florida Supreme Court directly and expressly conflicted with each and every other prior decision of the Florida Supreme Court on the entitlement to raise a new issue for the first time on appeal. On January 2, 1986 (Appendix C) SCHREIBER'S Motion for Rehearing was denied.

Whereupon, Petitioner brings the Cause here, seeking a review by this

Court of the Judgment and Decision of the Supreme Court of Florida.

REASONS FOR ALLOWANCE OF THE WRIT

I

THE PETITIONER, THE ESTATE OF AN ELDERLY PERSON DEFRAUDED OF HER PROPERTY, HAS BEEN DEPRIVED OF REAL PROPERTY, AND DUE PROCESS AS GUARANTEED IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES BY THE JUDGMENT OF THE SUPREME COURT OF FLORIDA REVERSING A DECISION OF THE FLORIDA DISTRICT COURT OF APPEAL, SITTING EN BANC.

As earlier discussed, under Jurisdiction, while although the Opinion and Decision of the Supreme Court of Florida is based upon a non-federal ground, federal constitutional rights may be denied as much by refusal of the Court to decide questions as by its erroneous decision. Lawrence v. Mississippi, supra. Furthermore, this

Court will neither condone or tolerate denial of due process of the law. As stated by Mr. Justice Brandeis in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra at 682:

> While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

The basis of the ruling below was the Court's considersation of a new issue raised for the first time on Rehearing by CHASE FEDERAL, even though for nearly eighty years, the established practice and policy of the appellate courts in Florida was to confine the parties to issues raised in the pleadings

and in the trial court and not to permit new issues to be raised for the first time on appeal. Where a state court has frequently dealt with particular issues under a specific procedure, this Court has held that a subsequent refusal to consider those issues under that procedure will not bar review by this Court. Williams v. Georgia, supra. This Case presented here is in the same posture.

As early as 1909 in Hartford Fire Ins. Co. v. Hollis, 50 So. 985, 989, 58 Fla. 268 (1909), the Florida Supreme Court stated:

> ...It is the declared policy of this Court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this Court...

In Jones v. Neibergall, 47 So. 2d 605 (Fla. 1950) at 606, the Supreme Court of Florida again stated:

> It is quite true that reasonable inferences from the evidence may be said to point to...equities, but not having been presented or ruled on by the trial court, it would be utter folly to urge their adjudication by this Court at this time. We will not devine issues from the ether nor attempt to adjudicate those not presented by the pleadings or ruled on by the trial court. (Emphasis added).

Eight years later the Court below stated in South Dade Farms, Inc. v. Peters, 107 So. 2d 30 (Fla. 1958) at 32:

> It is well established that this Court will not undertake to pass on questions until after the trial Judge hasd had an opportunity to consider same. City of Lake Worth v. First National Bank in Palm Beach, Fla. 1957, 93 So. 2d 49; Mariani v. Schleman, Fla. 1957, 94 So. 2d 829; Lee County Oil Company v. Marshall, Fla. 1957, 98 So. 2d 510.

And again, in 1962, that Court stated in Lite v. City of Miami, 141 So. 2d 738 (Fla. 1962) at 743:

> The record is devoid of a single fact which would indicate that this question was ever before the

> trial court. It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by this Court on appeal. Mariane v. Schleman Fla. 94 So. 2d 829; Jones v. Neibergall, Fla. 47 So. 2d 605. (Emphasis added).

As stated in In re: Beverly, 342 So. 2d 481 (Fla. 1977) at 489, a case in which the Supreme Court of Florida considered the constitutionality of a statute authorizing involuntary civil commitment of mentally-ill persons, the Court stated:

> ...[T]his Court should decline the review of questions which the trial court did not have a full and adequate opportunity to consider. Silver v. State, 188 So. 2d 300 (Fla. 1966); Reinhard v. Bliss, 85 So. 2d 131 (Fla. 1966).

In Silver v. State, 188 So. 2d 300 (Fla. 1966) in discussing a constitutional

issue that was raised for the first time on appeal but not before the trial court, the Court below stated:

> "...It is an attempt to circumvent the trial court despite the former ruling that an appellate court will disregard questions not presented to trial court. Ross v. Florida Sun Life Insurance Co., Fla. App., 124 So. 2d 892; Northeast Polk County Hospital District et al v. Snively, Fla. 162 So. 2d 657. In the Opinion in Mariani v. Schleman, Fla., 94 So. 2d 819 this Court said that it was "A rule of long standing that on appeal this Court [would] confine itself to a review of those questions and only those questions, which were before the trial court. Furthermore, the Court said 'matters not presented to the trial court by the pleadings and evidence will not be considered by this Court on appeal'". (Emphasis added).

And as recently as 1981, in Dover v. Worrell, 401 So. 2d 132 (Fla. 1981) at 1323, 1324 the Court said:

> In other areas of the law we have previously held it inappropriate to raise an issue for the first time on appeal. For example, an appellate court will not consider issues not presented to the trial judge either on appeal from an order of dismissal, Lite v. City of Miami, 141 So. 2d 783 (FLA. 1962) or on appeal from final judgment on the merits, Cowart v. City of West Palm Beach, 255 So. 2d 673 (Fla. 1971); Mariani v. Schleman, 94 So. 2d 829 (Fla. 1957); Jones v. Neibergall, 47 So. 2d 605 (Fla. 1950). We now add to this list and hold it inappropriate for a party to raise an issue for the first time on appeal from a summary judgment.

Regardless of these prior decisions, the Florida Supreme Court in this Decision appealed from totally disregarded its holdings when it stated in its Opinion, Appendix A:

> To the extent, however, there is doubt in the law of Florida as to the requirement of consideration when ownership of land is transferred, we find it conclusively resolved against such a requirement by the state constitutional law of homestead.

With that introduction, the Opinion appealed from goes on to discuss Article X, Section 4(c) of the 1968 Revision to the Florida Constitution as justification for its Decision in this Cause. [Although Mrs. Ross, the 90-year old grantor resided on the property, which is the subject matter of this action, she resided there alone. Under Florida Law, Florida Statute Chapter 222 (1983), and Constitution of the State of Florida, Article X, Section 4, the subject property would not qualify as homestead as Mrs. Ross purchased this property in her own name and was residing there alone when she was defrauded in 1977. Having no family living with her at the time, she cannot be deemed to be "the head of the family" residing on the subject property, as Florida homestead requires.

Therefore, this subject property did not meet the Florida qualification as "homestead property".]

With the foregoing in mind, the Supreme Court of Florida rationals (Appendix A) that:

> "Because the constitutional law of homestead protection has been changed to eliminate the requirement of a valuable consideration as a condition of any conveyance of homestead property, we conclude there should be no such limitation on the right to alienate by gift real property in general. If a homestead, which is the policy of the law to protect and preserve in the family, may be conveyed away by deed of gift, we see no reason why the same rule should not apply to all property. We, therefore, hold that there does not need to be consideration in order for an owner of land to convey it by deed to another person."

As can be readily seen from Appendix E, CHASE FEDERAL'S Answer in this Action; Appendix F, CHASE FEDERAL'S Motion for Rehearing from the unofficial

Decision (Appendix B) filed August 9, 1984; Appendix G, SCHREIBER'S response to CHASE FEDERAL'S Motion for Rehearing and Clarification filed August 20, 1984; and Appendix H, SCHREIBER'S Motion for Rehearing from the Decision appealed from and filed September 24, 1985, CHASE FEDERAL never raised the subject constitutional issue in this action before it filed its Motion for Rehearing and Clarification in 1984. As specifically stated in Appendix G before the Supreme Court of Florida:

> In this cause, Petitioner NEVER raised this constitutional issue in either the trial court, nor in the initial appeal in the Third District Court of Appeal, nor in the en banc proceedings held in the Third District Court of Appeal.
>
> This issue was not raised by the Petitioner in the appeal in this cause until the filing of this Motion for Rehearing.

> Furthermore, a review of "Other Authorities" cited by Petitioner in both its initial and reply Briefs discloses that no reference to Article X, §4(c), Fla. Const. was ever made.

On two occasions Mr. Justice Harlan wrote in NAACP v. Alabama, 357 U.S. 449, at 457-58, 78 S.Ct. 1163, at 1169; and in NAACP v. Alabama, 377 U.S. 288, 301, 84 S.Ct. 1302, 1311 that:

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. 357 U.S., at 457-458, 78 S.Ct., at 1169.

If, as here, a decision of a state supreme court can wipe out nearly eighty years of case law with the stroke of a pen, ignoring fundamental appellate practice, then most assuredly the litigant may in fact be deprived of the right

of appeal. Clearly, the opportunity to appeal an erroneous judgment is an essential element of the due process guaranteed in the Fourteenth Amendment of the Constitution of the United States.

II

THE FLORIDA SUPREME COURT IMPROPERLY USURPED THE POWER OF THE LEGISLATURE WHEN IT REMOVED THE COMMON LAW PROTECTION IN THE CONVEYANCE OF REAL PROPERTY

Article II, Section 3 of the Florida Constitution, as revised in 1968 states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Is is axiomatic that under the mandates of constitutional law, the

Constitution of the State of Florida is not a grant of power, but rather a limitation of power. Furthermore, the Court below specifically stated in, In Re Apportionment Law, Senate Joint Res. No. 1305, 263 So. 2d 797 (Fla. 1972) at 806:

> This Court in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of government, but will only measure the acts done within the aspect of the Constitution.

In the Opinion below the Supreme Court of Florida has now expanded the constitutional meaning of a portion of the Florida Constitution relating solely to homestead property and has interpreted it to mean that "For the conveyance of real property with no monetary consideration, there is no longer the

common law requirement that the grantee be related to the grantor by blood or marital affinity".

The rationale for this determination, as stated in the Opinion below, Appendix A, is that:

> ...[I]f a homestead, which it is the policy of the law to protect and preserve in the family, may be conveyed away by deed of gift, we see no reason why the same rule should not apply to all property. (Emphasis added).

Expanding the constitutional meaning of the 1968 Revision to the Florida Constitution, Article X, Section 4(c), to include all property, virtually overruled 450 years of common law as well as Section 2.01 Florida Statutes (1983) which states:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th Day of July, 1976,

> are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

The application of this Statute has been interpreted by Florida courts in Choctawatchee Elec. Coop., Inc. v. Major Realty Co., 161 So. 2d 837, 839 (Fla. 1st DCA 1964) where the court said:

> "Common law principles continue to prevail in Florida unless modified by statute."

Surely, then, based on the foregoing, the common law of doctrine requiring blood or marital affinity between a grantor and grantee of real property, for no monetary consideration, had been adopted by the State of Florida with the force and effect of a statute. The Decision below has now, in effect, repealed this body of law contrary to the Constitution of the State of Florida.

If the judiciary finds the meaning of a statute or a section of a constitution ambiguous or unclear, the normal procedure is to determine the legislative intent. This Court has continually relied on Congressional history. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d, 491 (1969); Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) and Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817 (1922). Had this been done concerning Article X, Section 4(c) of the Florida Constitution, as Revised in 1968, it would have become imminently clear that the Decision of the Supreme Court of Florida was totally different from the legislative intent. From the inception of this Amendment, the intent of this

revision was as stated by the Author of the Amendment in the transcript of the Preliminary Proceedings 1966-67 Florida Constitution 1968, page 258, et seq., (Appendix J) wherein former Supreme Court Justice, Mr. B. K. Roberts, said:

> ...[T]hat where a man and his wife had purchased and worked out a home, and for reasons of their own they see fit to leave it to one of a number of children, they should have a right to do so.

At page 260 of the transcript, the question of "consideration for a deed" arose, and Mr. Justice Roberts responded:

> I incline to the view that if a conveyance is made without consideration, that it would not be valid. (Emphasis added).

The intent of the framer of this revised section of the Florida Constitution was that the owner of

homestead and his wife could make a gift of their homestead property to "one of [their] children". Of course, the consideration reflected for the conveyance on the Deed would therefore be "good consideration" defined as:

> "Consideration based upon a natural duty which exists between relatives by blood or marriage." Words and phrases, Good Consideration (1972).

The clear intent of the framer of this Amendment was to maintain the "gift" within the family unit and not to expand its meaning as was done in the Opinion below. Furthermore, the 1968 Amendment to this Section of the 1885 Constitution of the State of Florida was explained to the voters of the State of Florida in the Official Analysis of the Proposed Constitution submitted by the

Legislature to the voters for radification at the November 5, 1968 General Election. This Official Analysis explained the change to the provision in issue as follows:

> ...The right of a married owner to directly transfer by deed, title of the homestead to himself and his spouse as an estate by the entirety should be given constitutional status. Also, the Legislature would be directed to provide a method of alienating or encumbering homestead property where either the owner or spouse is incompetent. (Emphasis added).

Draft of the proposed 1968 Constitution, Article X, Section 4 analysis of the Proposed Revision (July 20, 1968). See Appendix C, the dissent of Mr. Justice Overton.

In his dissenting opinion, Mr. Justice Overton goes on to demonstrate that he recognized the disparagement bet-

ween what the Electorate voted on and the impact of the wording of this Section of the Constitution as interpreted by the Decision below. It does not follow that the Decision below accurately reflects either the intent of the framers of this constitutional amendment or the offical interpretation offered to the voters of the State of Florida, who approved this amendment in 1968.

That the legislative and not the judicial branch of government is charged with the responsibility of creating new law has also been clearly recognized by this Court in National Broiler Marketing Assn. v. United States, 436 U.S. 816, 827, 98 S. Ct. 2122, 2130, 56 L.Ed.2d 728 (1978), in which this Court stated:

> ...but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute 'is not an empty vessel into which this Court is free to

> pour a vintage that we think better suits present day tastes'. United States v. Sisson, 399 U.S. 267, 297, 90 S.Ct. 2117, 2133 26 L.Ed.2d 608 (1970).
> Considerations of this kind are for the Congress and not the courts.

So too, the Florida Supreme Court is not permitted to intrude upon the domain of the Legislature and pour a new vintage into the vessel of an amendment of the State Constitution. See Article II, Section 3, Florida Const. (1983). But in this cause,when the Decision appealed from said, "[W]e see no reason why the same rule (as homestead) should not apply to all property", it has done just that. This is contrary to its prior decisions, contrary to its own State Constitution, contrary to the intent of this Amendment's author, contrary to the voice of the Electorate of Florida, and

contrary to the doctrine of the separation of powers.

This case is of vast public importance, for it concerns a growing problem common to all jurisdictions; i.e., fraud on the elderly. Not only does it impact upon the rights of the elderly, who when living alone are more susceptible to being defrauded of their property, but also, it impacts upon the viability of common law protections in the conveyance of real property in today's society.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectively submitted

Jerry B. Schreiber
Counsel of Record

By _____
Jerry B. Schreiber

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Writ of Certiorari and notice that Appendix to follow were mailed, postage prepaid, pursuant to Supreme Court Rules 28.3 and 28.4 to Therrell, Baisden, Stanton, Wood and Seitlin, 1111 Lincoln Road, Suite 600, Miami Beach, Florida 33139 and Frank Gramling, Esq., 750 S.E. 3rd Avenue, Suite 200, Ft. Lauderdale, Florida 33316, the 2nd day of April, 1986.

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By _____
Jerry B. Schreiber, Esq.

STATE OF FLORIDA)
)ss
COUNTY OF DADE)

Personally before the undersigned authority appeared Jerry B. Schreiber who, under oath and from his own personal knowledge, states that the foregoing Certificate of Service is true and correct. Dated 4/7/86

NOTARY PUBLIC, State of Florida, at Large.

My Commission Expires: 4/25/89

APPENDIX

The prepared Appendix for this Petition will be served as soon as the typing is complete. On the following page the reader will find the subject matter listing of the Appendix.

APPENDIX LISTING

Subject	Appendix
Opinion and Decision of the Supreme Court of Florida, dated August 30, 1985	A
Unofficial Opinion and Decision of the Supreme Court of Florida, dated July 26, 1984.	B
Order on Rehearing, dated January 2, 1986	C
Complaint of Petitioner . . .	D
Answer of Respondent	E
Respondent's Motion for Rehearing, filed in the Supreme Court of Florida on August 9, 1984	F
Petitioner's Response to Respondent's Motion for Rehearing, filed in the Florida Supreme Court on August 20, 1984	G
Petitioner's Motion for Rehearing, filed in the Florida Supreme Court on September 24, 1985	H

Appendix Listing - Continued

Subject	Appendix
Order of the Florida Supreme Court on Perezes' Motion to Intervene, dated March 6, 1986	I
Excerpt of Transcript of Preliminary Proceedings 1966-67, Florida Constitution, 1968	J

85-1810

(2)

Supreme Court, U.S.
FILED
APR 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1985

JERRY B. SCHREIBER,
Personal Representative
of the
ESTATE OF
THEADORES W. ROSS,
Petitioner,
vs.
CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

APPENDIX
TO

PETITION FOR WRIT OF CERTIORARI

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NOTE TO THE READER:

Petitioner has provided an Appendix Tracing Table in the beginning of this Appendix to facilitate its use. Direct reference is made to pages of the Petition for Writ of Certiorari

APPENDIX

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Petitioner's Motion for Rehearing filed in the Florida Supreme Court on September 24, 1985. . . H . . . 129a

Order of the Florida Supreme Court, on Perezes' Motion to Intervene, dated March 6, 1986 . . . I . . . 165a

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APPENDIX TRACING TABLE

DEVELOPED FOR PETITION FOR WRIT OF CERTIORARI

As this Appendix is so voluminous, the below tracing table was developed.

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2. Find appropriate/pertinent page in Appendix.

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[1]Incorrectly identified as "C" in Petition.

SUPREME COURT OF FLORIDA

Friday, August 30, 1985

CHASE FEDERAL SAVINGS AND
LOAN ASSOCIATION,
Petitioner,

vs. CASE No. 63,017

JERRY B. SCHREIBER,
Personable Representative
of the ESTATE OF THEADORES
W. ROSS,
Respondent.

The motion for rehearing is granted. The opinion filed in this case on July 26, 1984 is withdrawn, and the following opinion dated August 30, 1985, is substituted in lieu thereof.

BOYD, C.J., and ADKINS, ALDERMAN and SHAW, JJ., Concur

OVERTON, McDONALD and EHRLICH, JJ, Dissent

SUPREME COURT OF FLORIDA

No. 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, Petitioner,

vs.

JERRY B. SCHREIBER, Personal Representative of the Estate of Theadores W. Ross, Responsent.

ON REHEARING

(August 30, 1985)

BOYD, C.J.

This is a petition to review a decision of the Third District Court of Appeal, sitting en banc, reported as Schreiber v. Chase Federal Savings & Loan Association, 422 So. 2d 911 (Fla. 3d DCA 1982), in which the district court held that strict decisional conflict, as that concept has been used to define this

Court's authority to review district court decisions, is the standard to be used in determining when intra-district decisional conflict exists to allow the district court to sit en banc to harmonize its decisions. The district court certified the following question to be of great public importance:

> What is the proper scope of review for district courts of appeal in granting rehearings en banc?

We have jurisdiction. Art. V., § 3(b)(4), Fla. Const. We answer the certified question by holding that the district courts of appeal, in exercising their en banc power, are not limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction. We hold that the district courts are free to develop their own concepts of

decisional uniformity.

The case which precipitated the certification of the question concerning the scope of en banc review involves the validity of a deed to a grantee, not related to the grantor by blood or marriage, in which the stated consideration was "love and affection." The specific issue is whether a deed which shows on its face that the consideration is "love and affection," but does not show on its face that the grantor and grantee are related by blood or marriage, is effective to pass title.

The record reflects that Theadores Ross, a lady ninety years of age, transferred title to her home to Peter Cournoyer by a quitclaim deed which stated that "[t]his quitclaim deed is being given with the consideration being love and affection." The deed was

recorded with the minimum amount of documentary stamps affixed. Cournoyer then sold the property to Luis and Gladys Perez for $50,000. The Perezes obtained the major portion of the purchase price from a loan supplied by Chase Federal Savings and Loan Association and secured by a mortgage on the property in question.

After Cournoyer sold the property to the Perezes, Ross brought this action seeking cancellation of her deed to Cournoyer, Cournoyer's deed to the Perezes, and the Perezes' mortgage to Chase Federal, on the ground that the original deed to Cournoyer was void for lack of consideration. The trial court found "there was no consideration for the execution of . . . [the deed to Cournoyer] with the exception of love and

affection and therefore equitable title and interest in the subject property remained" in Ross. The trial court concluded, however, that "legal title did pass" from Cournoyer to the Perezes because the Perezes were bona fide purchasers having paid a valuable consideration without notice of any infirmity, and therefore their title to the subject property and interest in the subject property respectively shall stand." Finally, the trial court, holding that a constructive trust arose for the benefit of Ross in the proceeds received by Cournoyer in the sale to the Perezes, entered a judgment for Ross against Cournoyer in the amount of $50,000.

Ross appealed the trial court's denial of her claim for cancellation of the deeds and mortgage, asserting that the Perezes, as purchasers, and Chase

Federal, as mortgagee, did not have valid interests in the property because there was notice on the face of the deed to Cournoyer that the consideration was legally insufficient. Therefore, Ross contended, the Perezes were not bona fide purchasers for value without notice and Chase Federal could not claim a valid mortgage on the property. The district court of appeal initially rejected Ross's argument and affirmed the trial court's order without opinion. Judge Schwartz dissented. Ross moved for hearing en banc and and the court, pursuant to the procedure governed by Florida Rule of Appellate Procedure 9.331, granted it. A majority of the en banc court, considering the cause on the merits reversed the trial court, holding that under the district court's prior decision in Florida National Bank & Trust Company v.

Havris, 366 So. 2d 491 (Fla. 3d DCA 1979), a deed given to a non-relative in return for love and affection is invalid for lack of consideration. In so holding the district court found that the Perezes and Chase Federal were on notice to make inquiry concerning the propriety of Ross's deed to Cournoyer because the only consideration it reflected was "love and affection." The district court then remanded the cause with directions to cancel the deed to Cournoyer and the Perezes and the mortgage to Chase Federal. We hold that the deed was valid and effective to pass legal title notwithstanding that there was no valuable consideration paid and the grantor and grantee were not related.

The judges of the district court sitting en banc disagreed among themselves as to the standard to apply to

determine whether there was conflict between the decision of the initial three-judge panel of the district court in the instant case and the district court's previous decision in Havris. In the initial panel decision, as previously stated, the court affirmed the trial court without opinion with Judge Schwartz writing a dissent. The dissent asserted that the majority had failed to properly apply Havris. In Havris, an action was brought by the grantor to cancel a deed to the unrelated grantee on the ground that the deed was not supported by consideration, which was stated as love and affection. As noted, the district court there held that "love and affection" did not constitute valid consideration where the conveyance was between persons unrelated by blood or marriage and that the deed was invalid. In the instant case,

four members of the district court sitting *en banc* --Judges Schwartz, Hendry, Pearson, and Jorgenson--believed that there was "a lack of uniformity" between *Havris* and the initial decision in the instant case. These judges believed that Florida Rule of Appellate Procedure 9.331 allowed the district court to sit *en banc* in this case in order "to maintain uniformity of decisions." Four other judges of the en banc court--Judges Hubbart, Nesbitt, Barkdull, and Baskin--believed that the district court had no authority to sit *en banc* in this case because the controlling facts in *Havris* and this case were not the same. According to these four judges, there was no direct conflict between *Havris* and this case under the standard used by the Supreme Court of Florida

in exercising its conflict jurisdiction. These four judges concluded that they were obligated to follow the precedent established in Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), which defined decisional conflict as

> (1) the announcement of a rule of law which conflicts with a rule previously announced by this [Florida Supreme] Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court.

Id. at 731 (emphasis in original). One member of the en banc panel, Judge Ferguson, agreed that Nielsen provided the correct standard to be used by the district courts in determining conflict for en banc purposes, but believed that under that standard conflict existed between Havris and the initial panel decision in the instant case.

Judge Nesbitt, in a dissenting opinion

concurred in by four other members of the court, expressed the view that since the en banc rule was established to resolve intra-district conflict which was formerly resolved by the Supreme Court, then the power exercised by the district courts to hear en banc proceedings must be the same as the standard adopted by the Florida Supreme Court in the exercise of its discretionary conflict jurisdiction. Judge Nesbitt further asserted that any change in the definition of conflict by broadening the present Florida Supreme Court standard would be unconstitutional. Judge Hubbart wrote a dissenting opinion in which he agreed with Judge Nesbitt and detailed the history of Florida's rule 9.331.

We respectfully reject the interpretation that the district courts, in exercising their en banc powers, are limited

by the standards adopted in case decisions by this Court in the exercise of its discretionary conflict jurisdiction. This Court has held the en banc process to be constitutional and has stated that "[t]he district courts are free . . . to develop their own concept of decisional uniformity." In re Florida Rules of Appellate Procedure, Rule 9.331, 374 So. 2d 992, 994 (Fla. 1979) as modified in 377 So. 2d 700 (Fla. 1979), and as further modified in 416 So. 2d 1127 (Fla. 1982).

In holding the en banc process constitutional, we construed the "three judges shall consider each case" language of article V, section 4, as not restricting the district courts from hearing cases en banc. Our decision was consistent with the decision of the United States Supreme Court in Textile Mills Securities Corp.

v. Commissioner, 314 U.S. 326 (1941). In Textile Mills, the United States Supreme Court upheld the inherent authority of the Third Circuit Court of Appeals to establish a procedure for that court to sit en banc without authorization by existing rule, statute, or constitutional provision. See Hearing and Rehearing Cases En Banc, 14 F.R.D. 91 (3d Cir. 1953); Commissioner v. Textile Mills Securities Corp., 117 F.2d 62 (3d Cir. 1940. In construing the statutory provision establishing the federal circuit courts of appeals, the United States Supreme Court concluded that the proviso that there should be a circuit court of appeals in each circuit "which shall consist of three judges" did not prohibit an en banc process and that the court was not restricted to deciding cases with

only three judges. In approving this en banc process, the United States Supreme Court commented that it was a means of "more effective judicial administration" and determined that "[c]onflicts within a circuit will be avoided. Finality of decisions in the circuit courts of appeals will be promoted." 314 U.S. at 335. It should also be noted that in a subsequent case the United States Supreme Court reaffirmed this view and held that the en banc process was an expression of the court's power rather than a party's right. Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1953). In Western, the Court held that although a litigant does not have a right to an en banc hearing, the litigant must be given an opportunity to request such a hearing.

The federal en banc process is broader

than that provided in Florida Rule of Appellate Procedure 9.331 because, in addition to addressing issues of conflict, the federal process allows the courts of appeal to sit en banc to hear cases of "exceptional importance." When this Court adopted rule 9.331 in 1979, we decided that there was no need to authorize the en banc process in the district courts except for use in the settlement of intra-district conflict to help reduce the then-existing caseload of the Florida Supreme Court.

The en banc process now authorized for the district courts is designed to help the district courts avoid conflict, assure harmonious decisions within the court's geographic boundaries, and develop predictability of the law within their jurisdiction. Consistency of decisions within each district is essential

to the credibility of the district courts. There has been criticism of intermediate appellate courts for their failure to speak with "a single voice of the law." Meador, An Appellate Court Dilemma and A Solution Through Subject Matter Organization, 16 U. Mich. J.L. Ref. 471, 474 (1983). As judges are added to Florida's district courts to meet expanding caseloads, the resulting increased number of three-judge panels cannot help but increase the number of inconsistent and conflicting decisions. When there is a general rotation of Florida's district court judges among three-judge panels, the increased number of panel combinations compounds the problem. With a five-member court, the number of different panel combinations is ten. With a twelve-member court, however, the number of panel com-

binations is 220. The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole. The process provides an important forum for each court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within each court's jurisdiction. We have previously said that

> [u]nder our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole. . . .
>
> . . . .
>
> . . . We would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. . . . Consistency of law within a district is essential to avoid unnecessary and costly litigation.

416 So. 2d at 1128. We expressly granted the district courts broad discretionary authority "to develop their own concept of decisional uniformity" to be able to fully carry out these expressed purposes. 374 So. 2d at 994. In regard to the original panel decision in the instant case and the district court's decision in Havris, we agree with Judge Schwartz that it would be difficult for the legal profession to harmonize these decisions. Havris held that a deed to a non-relative not based on a valuable consideration was not effective to pass legal title; the original panel decision in the instant case affirmed a trial court decision holding that such a deed was effective to pass legal title.

We hold that the district court of appeal, in implementing the provisions of appellate procedure rule 9.331, has

authority to adopt the standard of conflict it believes necessary or appropriate in order to harmonize the decisions of the court and avoid costly relitigation of similar issues within its appellate district. We therefore quash the decision of the district court of appeal to the contrary.

We now reach the issue upon which the intra-district conflict below was predicated and which is the essential legal issue in question in the original dispute giving rise to this proceeding.

As was stated above, Theadores W. Ross conveyed her home to Peter R. Cournoyer by means of a quitclaim deed. The deed contained the standard formal reference to the "consideration of $10.00 and other valuable consideration," but contained an additional statement reciting, "This quitclaim deed is being given with the

consideration being love and affection."

The deed from Ross to Cournoyer was duly recorded. Subsequently, Cournoyer sold the property to Luis and Gladys Perez for$50,000. Mr. and Mrs. Perez, who are not parties to this proceeding, gave a mortgage on the property to respondent Chase Federal Savings and Loan Association to secure a loan which provided much of the purchase money.

After the conveyance from Cournoyer to the Perezes and the execution by the latter of the mortgage in favor of Chase Federal, Mrs. Ross brought an action to rescind and cancel her deed to Cournoyer. Her petition sought to have the deed set aside on the ground that a deed not supported by a valuable consideration can only be valid if the grantor and grantee are related either by consanguinity or by marital affinity. As for the claim of

the Perezes and their mortgage holder, Mrs. Ross argued that because the public record gave them notice that the deed to Cournoyer was void because given in consideration of love and affection to a grantee not declared in the deed to be a familial or marital relation of the grantor, they were not entitled to be treated as subsequent purchasers without notice of the invalidity of the deed.

The trial court found that there was in fact no monetary consideration paid for the conveyance from Ross to Cournoyer. The court nevertheless held that the deed was effective to pass legal title. The trial court found as a matter of fact that the Perezes and Chase Federal did not have actual notice of any formal defect or invalidity in the deed from Ross to Cournoyer. So the trial court declined to give Mrs. Ross the

requested relief of declaring her deed to Cournoyer a nullity and cancelling it. The court ruled, however, that when Cournoyer took legal title from Mrs. Ross, there was a resulting trust in her favor because of the lack of a valuable consideration. Therefore, when he subsequently sold the land, the court ruled, he held the proceeds in trust for her. The trial court accordingly entered judgment for Mrs. Ross in the amount of $50,000, equalling the proceeds of the sale by Cournoyer to the Perezes.

The judgment against Cournoyer in favor of Mrs. Ross, based on the resulting trust theory, was not appealed and its legal correctness is not an issue before us. Mrs. Ross appealed the trial court's judgment denying her claim for cancellation of the deed.

As was stated previously, the trial court's judgment was at first simply affirmed without opinion. Ross v. Chase Federal Savings & Loan Assn., 424 So. 2d 779 (Fla. 3d DCA 1981). On rehearing en banc, however, the district court of appeal reversed the trial court and held (1) that the deed from Ross to Cournoyer was void and not effective to convey any interest in the land and (2) that the Perezes and Chase Federal had constructive notice, from the title record, of the invalidity of the deed and therefore could not claim any interest superior to that of Mrs. Ross by virtue of being subsequent purchasers without notice. Schreiber v. Chase Federal Savings & Loan Assn., 422 So. 2d 911 (Fla. 3d DCA 1982). Petitioner Chase Federal contends that this ruling was error. We agree and quash the decision.

The district court sitting en banc adopted as its opinion on the merits of the case the dissenting opinion filed with the initial panel decision affirming the trial court. That opinion said in pertinent part:

> This court recently and squarely held in Florida National Bank and Trust Co. at Miami v. Havris, 366 So.2d 491 (Fla. 3d DCA 1979) that a deed given to a non-relative in return only for "love and affection" is "without consideration and . . . invalid." 366 So.2d at 496. Since Cournoyer was admittedly not related by blood or marriage to Ms. Ross, this principle is plainly applicable to this case. It is just as apparent that the Perezes and Chase were on implied or constructive notice of the resulting invalidity of the deed. The face of the recorded instrument itself shows that the only consideration was "love and affection" and did not affirmatively indicate any relationship between the grantor and grantee, who have different names., I think that these recitals clearly, and at the least, put subsequent purchasers to the minimal duty of inquiry as to whether such a relationship in fact existed . . . . Since it is undisputed both that

> such an investigation would have revealed that it did not and that no such investigation occurred, the cited cases require, in my view that the judgment below be reversed.

424 So. 2d at 779-80 (citations and footnotes omitted).

The Havris decision found by the district court to be controlling involved an action for rescission of a deed, reserving a life estate, from an elderly lady to her housekeeper's niece. The trial court found that the niece paid no valuable consideration for the conveyance but that the deed of gift was valid. The district court of appeal reversed, holding as follows:

> We hold, as contended by the appellant, that the two deeds by which this 94-year-old woman transferred her home to Mary Havris were without consideration and were invalid. In holding the unrecorded deed of March 19, 1975, was valid, the trial court misapprehended and misapplied the law, by concluding that love and

> affection of or towards one not a blood relation of the grantor constituted adequate consideration for Mrs. Garrett's deeding of her property to Mary Havris, to whom she was not related.

366 So.2d at 496.

A case in contrast to Havris is Williamson v. Kirby, 379 So.2d 693 (Fla. 2d DCA 1980). There an elderly lady conveyed her home to her close friend reserving a life estate to herself. A subsequently appointed guardian of the grantor sought to set aside the deed. Although alleging that the deed was given without consideration, the complaint also alleged that a relationship of confidence had existed between grantor and grantee and that the grantee had exercised undue influence in procuring the deed. The trial court found that there was no consideration paid, the deed of conveyance

being "an outright gift," that there was a confidential relationship, that the grantee was active in procuring the gift, and that the deed was the result of undue influence. The district court agreed that the circumstances of the relationship of trust and confidence together with the conduct of the grantee in facilitating the conveyance were sufficient to raise a presumption of undue influence, but disagreed that this justified setting aside the deed.

> If the contestant is successful in raising the presumption, the beneficiary then has the burden of explaining his active involvement in the preparation of the will [or inter vivos gift]. He does not have the burden of disproving undue influence. If the explanation is reasonable, the presumption vanishes and it becomes the court's responsibility to determine whether the contestant has established undue influence by the greater weight of the evidence. Such evidence may include not only the evidence initially presented

> to raise the presumption but any additional evidence which the parties have introduced.

379 So.2d at 695 (bracketed language added). The court found that the grantee's explanation of her involvement in the procuring of the conveyance rebutted the presumption of undue influence and that the evidence as a whole showed that the gift was not the product of undue influence. The evidence showed that the grantee's conduct was not improper and the grantor's gift was voluntary and reasonable under the circumstances.

> While our courts must be vigilant to protect the aging against any form of overreaching, simply because an elderly person chooses to give her property to a friend instead of her relatives does not warrant cancelling the deed where as here there is no real proof of undue influence.

Id. at 697. While it appears from the opinion that lack of consideration was either not raised on appeal or was abandoned, it is highly significant that there was no suggestion in the opinion that a deed is rendered invalid solely because of the lack of valuable consideration and lack of family relationship. A comparison of Williamson v. Kirby with Havris and the district court decision in the present case suggests an inconsistency in the law on this question.

We are also troubled by the implications of Havris in the area of charitable gifts of land. Where one donates land for religious, educational, or philanthropic purposes, it seems clear that there is no real monetary consideration and that any recitation of nonminal con-

sideration in the deed is purely a matter of form. Yet under Havris, such a gift may be set aside contrary to the intent of the donor.

As was stated above, the district court relied on Havris as the determinative authority for its decision. In Havris, as authority for its holding, the court cited the statement in 10 Florida Jurisprudence, Deeds § 59 that for love and affection to constitute good consideration, "there must be some blood or marriage relationship between the grantor and the grantee." "Said statement," the court said, "is derived from the English Rule which requires that in order for love and affection to be good consideration for a conveyance, said love and affection must be toward one to whom a natural duty exists, such as near rela-

tives by either consangunity or affinity." Id at 496. The only Florida decisions cited in support of the ruling were cases where love and affection was ruled sufficient consideration and the grantor and grantee were related.[1] No case was cited where a deed was cancelled by a Florida court because of lack of a valuable consideration. The question before us is whether the "English Rule" referred to in Havris is part of the law of Florida. As has already been indicated, we find that it is not.

The so-called English Rule relied on by Havris and by the district court in the instant case can be summarized as follows: a deed, in order to be effec-

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[1]Wise v. Wise, 134 Fla. 553, 184 So.91 (1938); Waterman v. Higgins, 28 Fla. 660, 10 So. 97 (1891); Vasquez v. Santisteban, 334 So.2d 97 (Fla. 3d DCA 1976). The cases are cited at 366 So.2d at 497.

tive to pass title, must be supported by either a valuable or a good consideration, the former being required in deeds by bargain and sale and the latter being sufficient in covenants to stand seised to the use of another, which may only be used when the grantor and grantee are related by consanguinity or marital affinity. See 4 H. Tiffany, The Law of Real Property § 957 (3d ed. 1975); 23 Am. Jur. 2d Deeds §§ 12-13, 61-62 (1965). Some secondary sources of legal authority indicate that this rule is in effect in Florida by virtue of the operation of the Statute of Uses. See, e.g., 19 Fla. Jur. 2d §§ 5, 44, 49-50 (1980). However, we find no binding legal authority holding that the purported rule is now a viable part of Florida law.

The Statute of Uses was enacted in 1535 to remedy the problems caused by dual legal and equitable ownership of land.[2] Equitable ownership had arisen as a means of avoiding the legal requirements of land transfer and the feudal incidents of legal land ownership.[3] The statute provided that anyone with beneficial ownership of land should henceforth be deemed to be the legal owner.[4]

After the enactment of the statute, the common-law courts began to recognize

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[2] 1 H. Tiffany, The Law of Real Property § 224 (B. Jones, 3d ed. 1939)); Smith, The Statute of Uses: A Look at Its Historical Evolution and Demise, 18 W. Res. L. Rev. 40, 47 (1966); Wilson, The Florida Statute of Uses, 21 Fla. L.J. 131 (1947).

[3] Tiffany, supra § 221; Payne, The English Theory of Conveyances Prior to The Land Registration Acts, Ala. L. Rev. 227, 240-41 (1955).

[4] See 27 Hen. 8, c. 10 (1535), as quoted in Smith, supra at 53-54.

the ownership interests of beneficiaries of uses, treating them as legal title holders. Previously their interests were only enforceable in the chancery court.[5] Two methods of transferring uses, that is, equitable ownership interests, previously recognized in the chancery court, were the "bargain and sale" and the "covenant to stand seised to the use of another."[6] After the enactment of the statute, these two conveyancing methods came to be recognized as valid the the law courts and became the most commonly used forms of deeds. As a matter of form, the common-law courts imposed the same prerequisites to enforceability as

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[5]Ames, The Origin of Uses and Trusts, 21 Harv. L. Rev. 261 (1908); Bordwell, Equity and The Law of Property, 20 Iowa L. Rev. 1 (1934).

[6]4 H. Tiffany, The Law of Real Property, § 957 (3d ed. 1975).

had developed in the court of chancery prior to the enactment of the statute. Those requirements included monetary consideration in the case of the deed by "bargain and sale." The "covenant to stand seised to the use of another" was enforceable in equity without a monetary consideration if made to a family member, and was widely used in connection with marriage settlements. The common-law courts imposed the same requirements.[7]

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[7]Tiffany, supra Ames, supra, at 268-69:

> [F]or the most part equity declined to enforce gratuitous instruments made under seal. There was, however, one class of gratuitous grants of land by deed in which equity created a use in favor of the donee; namely, grants or covenants to stand seised to the use of a blood relation, or of one connected by marriage. These uses are commonly said to arise in consideration of blood or marriage. But consideration in such cases is not used in its normal sense of the equivalent for a promise, but in general sense of reason or inducement for the agreement to stand seised. The exception in favor of those related by blood or marriage had in

The requirement of consideration, and the exception allowing "good" consideration to suffice in transfers to one related by blood or marriage, were originally imposed as prerequisites to enforcement of a promise to hold land for the benefit of another. Often the petitioner was one who had paid money in exchange for the promise and the chancery court considered it unjust for the covenantor to withhold the benefits after having received the money.[8] Often the remedy was a decree requiring the legal conveyance of the land to the covenantee.[9]

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truth nothing to do with the doctrine of consideration and was established in the interest of the great English families.

[8]Ames, supra, at 267: "Equity could not . . . refuse relief to the buyer of land against a seller who, having the purchase money in his pocket, refused to convey . . . ."

[9]Ames, supra; Smith, supra.

While consideration was thus an important factor to the chancery court in arriving at the conclusion that the prayer for relief was equitable, it should be remembered that at the same time there was no requirement of consideration to make effective the ordinary conveyance of legal ownership of land by livery of seisin.[10] Thus the chancery court's requirement that there be consideration as a prerequisite to enforcement of a use by bargain and sale or by covenant to stand seised to the use of another is very much like our modern law's requirement of consideration to support enforcement of a promise made in a contract. It is by something of an

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[10] See 6 A R. Powell, The Law of Real Property § 880 (P. Rohan, ed. 1984); Bordwell, Equity and The Law of Property, 20 Iowa L. Rev. 1, 12-13 (1934); Payne, The English Theory of Conveyances Prior to the Land Registration Acts, 7 Ala. L. Rev. 227, 240-41 (1955).

historical accident that modern deeds are said to require a valuable or good consideration. This formal requirement has persisted because the modern deed is the descendant of the most popular forms of conveyance used after the enactment of the Statute of Uses.

Florida has its own version of the Statute of Uses. Section 689.09, Florida Statutes (1983), provides as follows:

> By deed of bargain and sale, or by deed of lease and release, or of convenant to stand seized (sic) to the use of any other person, or by deed operating by way of covenant to stand seized to the use of another person, of or in any lands or tenements in this state, the possession of the bargainor, releasor or covenantor shall be deemed and adjudged to be transferred to the bargainee, releasee or person entitled to the use as perfectly as if such bargainee, releasee or person entitled to the use had been enfeoffed by livery of seizen (sic) of the land con-

> veyed by such deed of bargain and sale, release or covenant to stand seized; provided, that livery of seizin can be lawfully made of the lands or tenements at the time of the execution of the said deeds or any of them.

The fact that the statute, like the English statute, provides that various forms of deeds are sufficient to vest legal title in the grantee, has led to the statement found in some authorities to the effect that a consideration is necessary to support a deed. E.g., 19 Fla. Jur. 2d, Deeds, §§ 5, 44 (1980). However, section 689.09 does not expressly require that a deed of land be supported by consideration in order to be effective. Nor is such a requirement clearly found in the decisions applying, interpreting, or construing the statute.[11] The statute merely operates

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[11] See, e.g., Farrington v. Greer, 94 Fla. 457, 113 So. 722 (1927); Scott v. Fairlie, 81 Fla. 438, 89 So. 128 (1921); Vincent v. Hines, 79 Fla. 564

to vest legal title in the beneficiary when real property is conveyed to a grantee for the benefit of another.[12]

It is now widely recognized that the chancery court's requirement of consideration as a prerequisite to enforcement of what we today would treat as a contract to convey has little logical relation to modern land conveyancing.

> The old rule of the court of chancery, still part of the law of trusts, that the court would not interfere to compel performance of a purely voluntary promise, confined enforcible uses before the statute to those founded on a consideration; and therefore a consideration was essential to raise a use under the statute,

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(1920); Skinner Mfg. Co. v. Wright, 56 Fla. 561, 47 So. 931 (1909); Parken v. Sazfford, 48 Fla. 290, 37 So. 567 (1904).

[12] E.g., Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940); Hamilton v. Flowers, 134 Fla. 328, 183 So. 811 (1938); Newman v. Equitable Life Assurance Society, 119 Fla. 641, 160 So. 745 (1935); Budd v. Long, 13 Fla. 288 (1869).

> and a conveyance would not operate under the statute of uses unless there was a consideration recited or proved. On this ground American courts have denied deeds effect as conveyances by way of use. But the greater number of our courts, by far, give no regard to such objections, holding that our conveyances operate by virtue of the state statutes, without any respect to the old requirements.

Rood, The Statute of Uses and the Modern Deed, 4 Mich. L. Rev. 109, 121 (1905). Among the author's conclusions in the work just cited were:

> (1) that the statute of uses, the doctrines concerning uses, and conveyances operating by virtue of the statute of uses, have little or nothing to do with the validity of the ordinary conveyance in the great majority of the states. It must be remembered that we are not discussing the importance of the old law to enable one to understand, or as still governing, trusts, whether created by deed or otherwise.
>
> (2) That generally a conveyance satisfying the local statutes is sufficient, and one not satisfying such statutes is insufficient, regardless of the old common law.

Id at 123.

All scholars and commentators now agree that the role of consideration in land conveyancing has been reduced to a mere matter of form except when courts choose to rely on the lack of consideration as a reason to intervene when something fraudulent or inequitable has taken place. Powell says, "Today, the necessity for consideration has become a pure matter of form." 6A Powell, supra § 888 (foot note omitted). By Tiffany we are told, "Although there can be not the slightest question that a conveyance is ordinarily valid without any consideration, expressions are to be found in judicial opinions in this regard which may tend to mislead." 4 Tiffany, supra § 984. Boyer reasons that when a deed recites no consideration, it is logical

to presume "that a gift was intended." 1 R. Boyer, Florida Real Estate Transactions § 11.01 (1984). Boyer also appears to be on firm ground when he concludes as follows:

> It is believed that the role of consideration in suits for avoiding deeds is an ancillary one, and that the real issue in most cases is simply the attainment of an equitable result. Thus, no consideration, failure of consideration, or even inadequate consideration are circumstances to be considered along with others in deciding whether fraud, undue influence, violation of confidence or unconscionable advantage exists. Many of the deeds that have been cancelled for failure of consideration were given in exchange for support. When that support was not forthcoming and the familial love thereafter waned, one might infer either that the promises were made with no intention of keeping them; hence, were fraudulent, or that the deed was executed as a result of undue influence. In any event, to not cancel the deed would be most inequitable, tantamount to letting the grantee perpetrate a fraud on the grantor, or allow the grantee to be unjustly enriched at the grantor's expense.

Id. (footnotes omitted).

There are numerous examples that illustrate this point. In Anders v. Anders, 143 Fla. 721, 197 So. 451 (1940), the Court approved the cancellation of a deed given in exchange for a promise of support where the grantee made the promise fraudulently to procure the conveyance. The fact that the support promised was not given -- i.e. the failure of consideration -- was a factor which, taken together with the circumstances of fraud and undue influence, was deemed to justify cancellation. See also Cook v. Adams, 89 So.2d 6 (Fla. 1956); Carter v. Colson, 142 Fla. 187, 194 So. 619 (1940).[13] In Anders, the

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[13]Similarly in Tampa Northern R. Co. v. City of Tampa, 104 Fla. 481, 140 So. 311 (1932); the grantee was held entitled to reformation of the deed where the conveyance was made in

grantor and grantee were related by marriage so under the Havris rule there was a "good" consideration for the conveyance. In Parrish v. Robbirds, 146 Fla. 324, 200 So. 925 (1941), on the other hand, the Court held that there was no basis for equitable relief by cancellation or rescission, where the record showed no "taint of illegality." The Court noted both the family relationship and that the land was conveyed in return for services as showing consideration, "besides the recital that a valuable consideration passed."[14] Of similar import are such cases as Drumwright v. Dana, 138 Fla. 672, 190 So. 54 (1939); Wise v.

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exchange for a promise to develop the land and improvements were constructed.

[14] See also Harkness v. Fraser, 12 Fla. 336 (1868), where the court declined cancellation sought on the ground that the agreed consideration had not in fact been paid.

Wise, 134 Fla. 553, 184 So. 91 (Fla. 1938); and Waterman v. Higgins, 28 Fla. 660, 10 So. 97 (1891).

In Supple v. Supple, 370 So.2d 834 (Fla. 3d DCA 1976) and Severi v. Neville, 361 So.2d 786 (Fla. 4th DCA 1978), conveyances were upheld where there was both a family relationship and the provision of services as consideration supporting the deed. In Vasquez v. Santisteban, 334 So. 2d 97 (Fla. 3d DCA 1976), the lack of monetary consideration was rejected as a ground for setting aside an intra-family conveyance, but the case is much more significant and interesting for the burden it placed on a judgment creditor seeking to establish that the conveyance was fraudulent.[15] In Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359 (1852), a

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[15]See Neal v. Gregory, 19 Fla. 356 (1882), where the lack of consideration was one factor in setting aside a fraudulent conveyance.

deed of conveyance of a mortgage was set aside and the Court made the statement that in the absence of "consideration of benefit or advantage to the grantor, or of detriment to the grantee, to support these deeds," they must be declared "nuda pacta." But it should be noted that the conveyance there, a mortgage executed along with a note, was an integral part of an understanding which the Court found to be contractual in character and, the bargained-for consideration not having materialized, the Court set the mortgage aside. The case certainly does not stand for the proposition that there can be no such thing as an absolute deed of gift.

We can find no reported Florida appellate court case in which a deed was set aside soley on the ground of lack of

consideration existing to support the deed except Havris and the district court decision in the instant case. We conclude that the case law of Florida does not support the proposition that the historical equitable requirement of valuable or good consideration to support enforcement of the deed of bargain and sale or of covenant to stand seised, respectively, is party of the law of Florida now applicable to deeds generally. As the above-quoted scholarly article by Mr. Rood advises, we believe the formal requirements for conveyances are found in the conveyancing statutes. Neither sections 689.01 - .03, Florida Statutes (1977), nor section 689.09 for that matter contain any mention of a requirement of consideration.

To the extent, however, that there is doubt in the law of Florida as to the

requirement of consideration when ownership of land is transferred, we find that it is conclusively resolved against such a requirement by the state constitutional law of homestead.

In 1968, a new and substantially revised state constitution was adopted by the electorate of Florida. See House J. Res. 1-2X; Sen. J. Res. 4-2X; Sen. J. Res. 5-2X (1968). Among the changes was an amendment to the provisions on exemption of homesteads from forced sale. Article X, section 1 of the Florida Constitution of 1885 provided for protection of homesteads from "forced sale under process of any court," and that "no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article." As a concomitant incident of this basic constitutional policy, property covered by the

homestead exemption was not subject to being freely devised by the owner if there were surviving spouse or children. Art. X, § 4, Fla. Const. of 1885. However, article X, Section 4 of the Florida Constitution of 1885 does not prohibit the holder of homestead property from "alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists."

Pursuant to article X, section 4, this Court held that the holder of homestead property, joined by the spouse if married, could convey the property, even if there were children to whom it would descent upon the death of the owner, but only for a valuable consideration. Regero v. Daugherty, 69 So. 2d 128 (Fla. 1953); Daniels v. Mercer, 105 Fla. 362, 141 So. 189 (1932). This holding was in

keeping with the constitutional policy of preserving the family homestead as a means of providing continued shelter to the family. Without valuable consideration, a conveyance of the homestead was void. See, e.g., Reed v. Fain, 145 So.2d 858 (Fla. 1962).

Article X, section 4 of the Florida Constitution, as revised in 1968, provides in pertinent part: "The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift . . . ." The change from language allowing "alienating by deed or mortgage" to language allowing the owner to "alienate . . . by mortgage, sale, or gift" has the clear and unequivocal effect of authorizing the owner of homestead property, joined by the spouse if married,

to give away the homestead property, that is, to convey it by deed without consideration. Nothing in the 1968 constitution appears to limit this provision authorizing the owner to give away the property. Thus there is no requirement that the grantee be related to the grantor by consanguinity or marital affinity.

Because the constitutional law of homestead protection has been changed to eliminate the requirement of a valuable consideration as a condition of any conveyance of homestead property, we conclude there should be no such limitiation on the right to alienate by gift real property in general. If a homestead, which it is the policy of the law to protect and preserve in the family, may be conveyed away by deed of gift, we see no reason why the same rule should not apply to all property. We

therefore hold that there does not need to be consideration in order for an owner of land to convey it by deed to another person.

It follows from our holding that the estate of Mrs. Ross is not entitled to have the deed set aside on the ground that it was void. Nor does the estate have any equitable claim superior to that of the subsequent purchasers and mortgagee on the ground that they had notice of the defect in the deed, because there was no defect in the deed.

We deem it advisable to caution against too broad an interpretation of our holding. It should be obvious that our opinion does not in any way affect the existing law of Florida under which consideration is required to support contractual undertakings of any kind whether characterized as contracts, cove-

nants, promises, agreements, or the like. Nor do we intend our ruling to eliminate all cognizance of the existence of consideration in land conveyancing when it is properly relevant to some legal question. We hold only that a deed, sufficient in form, voluntarily executed by a competent grantor, is effective to convey the owner's legal title regardless of whether he receives a contractual consideration. We do not intend to change any part of that body of the law that treats purchasers for consideration differently from gratuitous grantees for purposes of establishign title priorities under the recording statute, section 695.01, Florida Statutes (1983), Moyer v. Clark, 72 So.2d 905 (Fla. 1954), Zachary Veneer Co. v. Engelken, 136 Fla. 89, 186 So. 813 (1939); Black v. Skinner Mfg. Co., 53 Fla. 1090, 43 So. 919 (1907);

Stockton v. National Bank of Jacksonville, 45 Fla. 590, 34 So. 897 (1903), or common-law legal or equitable principles. See, e.g., Myers v. Van Buskirk, 96 Fla. 704, 119 So. 123 (1928). Nor does our holding say anything about the right of a gratuitous grantee to obtain reformation of a deed in equity. See, e.g., Harrod v. Simmons, 143 So.2d 717 (Fla. 2d DCA 1962). Nor do we mean to make any statement of law regarding the significance of consideration or the lack thereof when a deed is challenged as a fraudulent conveyance, see, e.g., Sample v. Natalby, 120 Fla. 161, 162, So. 493 (1935), or as having been procured by fraud, coercion, or undue influence. See e.g., Peacock v. DuBois, 90 Fa. 162, 105 So. 321 (1925). In this connection, we point out again that the complaint to cancel the deed in

this case was based entirely on the lack of a valuable consideration and did not allege fraud, coercion, or undue influence.

Finally and perhaps most importantly, our holding is not intended to detract in any way from the power of a court of equity, in a proper case, to order cancellation or rescission of a deed for lack or failure of consideration where consideration is demonstrably intended by the parties as part of the transaction and where such relief is sought on proper equitable grounds. We only hold that an owner of land may make a gift of it to another person regardless of family or marital relationship.

Our holding that an owner of land generally may convey it without consideration to any person the grantor

chooses is a rational and realistic position, more in keeping with the practicalities of modern land conveyancing than the Havris rule, rooted as it is in the practices of four and a half centuries ago. See, e.g., American Foam Industries, Inc. v. State Dept. of Revenue, 345 So.2d 343 (Fla. 3d DCA 1977) (quitclaim deed from sole stockholder to corporation without consideration required only minimum number of documentary stamps).

The decision of the district court of appeal on the question of the validity of the deed is quashed with directions that the case be remanded to the trial court for entry of a judgment for petitioner-defendant Chase Federal Savings and Loan Association. As has already been indicated, we also quash the district court's decision on the scope of its en banc

authority.

It is so ordered.

ADKINS, ALDERMAN and SHAW, JJ., Concur.

OVERTON, J., Concurs in part and dissents in part with an opinion.

EHRLICH, J., Concurs in part and dissents in part with an opinion, in which McDONALD, J., Concurs.

McDONALD, JR., Dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring in part dissenting in part.

I fully concur with that part of the majority opinion which holds that a district court of appeal has the en banc authority "to adopt the standard of

conflict it believes necessary or appropriate in order to harmonize the decisions of the court and avoid costly relitigation of similar issues within its appellate district." That is the issue that gave this Court jurisdiction in this cause, by way of the question certified by the district court.

For the following reasons I strongly dissent from the portion of the majority opinion holding there was no defect in the deed from the 90-year-old-woman to the young man, a non-relative who is referred to in one portion of the district court of appeal's opinion as a "con man." In my view, the majority's decision provides a means to protect title to real property for gigolos, mistresses, and con artists, and alters four and one-half centuries of common law in the process.

In determining the validity of a conveyance, it is necessary to consider certain established legal principles and definitions. "Good consideration" and "valuable consideration" are terms of art with established legal meanings. The term "valuable consideration" means that the grantor has received something of value, such as services or money, for the conveyance of the property. See 3 Am. Jur. 2d Deeds § 91 (1968); 17 C.J.S. Contracts § 92 (1963); Words and Phrases, "Valuable Coinsideration" (1972). The term "good consideration" denotes consideration based on a natural duty which exists between relatives by blood or marriage. The consideration is stated to be founded on love and affection, as a result of the natural duty that flows from the relationship. See 23 Am. Jur 2d Deeds § 92 (1968); 17 C.J.S. Contracts §

92 (1963); Words and Phrases, "Good Consideration" (1972).

In Peacock v. DuBois, 90 Fla. 162, 105 So. 321 (1925), Mrs. DuBois, a woman in her late fifties who was facing a serious operation, conveyed her home to a 28-year old man who boarded in Mrs. DuBois' house for the three-month period preceding her death. In affirming the cancellation of the deed, This Court quoted with approval a decision of the Pennsylvania Supreme Court holding that

> where a conveyance was made by a weak and sickly young man to a woman older than himself, and who had been to him as a mother, a presumption arose that such conveyance was obtained by undue influence.

Id. at 166, 105 So. at 327 (emphasis added). This Court noted in the Peacock decision that Mrs. DuBois was not bound to the young man "by love and affection," and stated:

> The fact of the execution of the deed on the showing made by the record, we think, imposes on the appellant the duty of showing that the transaction was bona fide and that it was not secured by undue influence.

Id. at 167, 105 So. at 323 (emphasis added). This rule establishing a presumption of invalidity when there is no consideration for the conveyance was reaffirmed by this Court in a case involving a dispute between a mother and her son over title to real property in which this Court quoted with approval the following statement:

> Inadequacy of consideration, where shown, is an element which is always given great weight by courts of equity in determining whether a transaction involving the transfer of valuable property by one to another is unconscientious or constructively fraudulent or perhaps as tending to prove actual fraud. Indeed, it has always been looked upon by such

> courts as sufficient to create a strong suspicision that the transaction has not been characterized by good faith in the party securing benefits thereby and to cast upon him the burden of making it perfectly clear that it was in all respects honest and fair and just to the grantor.

Stovall v. Stokes, 94 Fla. 717, 743, 115 So. 828, 837 (1927) (quoting Lynch v. Lynch, 22 Cal. App. 653, 661, 135 P. 1101, 1104 (Cal. Dist. Ct. App. 1912) (emphasis added). This Court has also approved a parol gift of land contrary to the Statute of Frauds providing conclusive proof exists of the following elements: "(1) words showing an intent to give the land, (2) that possession was taken in reliance on the gift, and (3) that the donee made permanent and valuable improvements in anticipation of the gift, with the donor's acquiescence." Green v. Price, 63 So. 2d 337, 338 (Fla. 1953).

In the instant case, the deed in issue stated on its face that the consideration for the conveyance was "love and affection." Nothing on the face of the deed indicated Mr. Cournoyer was related to the grantor, Mrs. Ross. The law is well-established that for "consideration" to be derived from "love and affection," there must be a "natural duty" which flows only from a family relationship by blood or marriage. Because Mrs. Ross and Mr. Cournoyer shared no family relationship, "good consideration" as that term is defined, did not exist. Under existing law, for the conveyance to be valid, the beneficiary must establish that the transaction was not the result of undue influence, fraud, or unconscionability. When, as here, it is apparent on the face of the deed that the conveyance is without consideration, any subsequent

purchaser of the property takes title with notice of that defect. In my view, one who purchases property from the beneficiary of this type of conveyance must obtain other evidence of donative intent of the grantor to ensure that valid title can be conveyed.

I am also concerned that the decision on the merits of this case is directed towards an issue that was not presented or addressed by the trial court, the district court of appeal, or this Court in the first appeal. The issue initially argued and addressed was whether the purchasers of the property from Mr. Cournoyer and their mortgagee were bona fide holders for value without notice. I am concerned by the fact that this Court is deciding an extremely important property law issue on the basis of research

Court, without full use of the adversary system and an opportunity for all parties to fully brief and address the question we now answer.

I reject for two reasons the contention that the change in the 1968 Constitution, article X, section 4, should control the result reached in this case. First, as noted, prior to the adoption of the 1968 Constitution, this Court recognized that a gift of real property could be made in limited circumstances. Second, in the official analysis of the proposed constitution submitted by the legislature to the voters for ratification at the November 5, 1968, general election, the change to the provision in issue is explained as follows:

> [T]he right of a married owner to directly transfer by deed the title of the homestead to himself and his spouse as an estate by the entirety would be given constitutional status. Also, the Legislature would be directed to provide a method of alienating or encumbering homestead property where either the owner or spouse is incompetent.

Draft of Proposed 1968 Constitution, Art. X, § 4 analysis of proposed revision (July 20, 1968). No explanation of the major change addressed in the majority opinion was stated or implied.

EHRLICH, J., concurring in part and dissenting in part.

An oft-noted feature of Florida's judicial organization is that our district courts of appeal are intended to be, in most cases, courts of last resort. Johns v. Wainwright, 253 So.2d 873 (Fla. 1971); Karlin v. Miami Beach, 113 So.2d 551 (Fla. 1959); Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). Today's decision

merely serves to reemphasize the finality of the district courts' jurisdiction.

The courts of appeal establish a coherent and consistent body of precedent for the courts in that district. Our jurisdiction to review their decisions is the exception, rather than the rule. In light of this constitutionally imposed responsibility, taking it upon ourselves to define intra-district conflict for the districts themselves would be overreaching and presumptuous.

Our conflict jurisdiction attaches when districts are in express and direct conflict on the same question of law. Art. V., § 3(b)(3), Fla. Const. We should not expand our jursidiction by reviewing differences in internal procedures which do not hinder the statewide administration of justice.

I would approve the decision of the

district court of appeal on the issue of whether love and affection are sufficient consideration for a deed.

McDONALD, J., Concurs.

McDONALD, J., dissent in part.

I will accept, for the moment, that a person may convey property to a nonfamily member without consideration. But I am strongly of the view that such a conveyance is voidable upon a showing of undue influence or fraud on the part of the grantee. When a conveyance is to a nonfamily member and the consideration is plainly described as love and affection, it should alert all successors in title that the transaction may be suspect and subject to being voided. A grantor, or his heirs, should be able to rescind such a transaction and that person should be favored with a presumption of fraud or

undue influence under the circumstances. Should the grantee dispel this presumption, such a suit for cancellation would fail. Should the grantee fail in this regard, the deed should be voided, together with voiding any successive transaction.

This cause should be remanded to the trial judge for him to decide the issue of fraud and undue influence in reference to the conveyance from Ross to Cournoyer.

SUPREME COURT OF FLORIDA

No. 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, Petitioner,

vs.

JERRY B. SCHREIBER, etc., Respondent.

(July 26, 1984)

Overton, J.

This is a petition to review an en banc decision of the Third District Court of Appeal reported as Schpeiber v. Chase Federal Savings & Loan Association, 422 So. 2d 911 (Fla. 3d DCA 1982), in which the members of the district court were in disagreement as to the standard to be used in determining when intra-district decisional conflict exists to allow the district court to sit en banc to har-

monize its decisions. The district court certified the following question to be of great public importance:

> What is the proper scope of review for district courts of appeal in granting rehearings en banc?

We have jurisdiction. Art. V., § 3(b)(4), Fla. Const. We answer the certified question by holding that the district courts of appeal, in exercising their en banc power, are not limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction. We hold that the district courts are free to develop their own concept of decisional uniformity.

The case which precipitated the certification of the question concerning the scope of en banc review involves the validity of a deed to a grantee, not related to the grantor by blood or

marriage, in which the stated consideration was "love and affection." The specific issue is whether a deed which shows on its face that the consideration is "love and affection," but does not show on its face that the grantor and grantee are related by blood or marriage, places a subsequent grantee on notice that the deed may be void.

The uncontroverted facts reflect that Peter Cournoyer induced Theadores Ross, a lady ninety years of age, to transfer title in her home to him by a quitclaim deed which stated that "[t]his quitclaim deed is being given with the consideration being love and affection." The deed was recorded with the minimum amount of documentary stamps affixed. Cournoyer then sold the property to Luis and Gladys Perez for $50,000. The Perezes obtained the major portion of the

purchase price from mortgage proceeds supplied by Chase Federal Savings and Loan Association. The Perezes proceeded to close the transaction without a lawyer, asserting that they were relying on Chase Federal and its lawyers in closing the transaction.

After Cournoyer sold the property to the Perezes, Ross sought to cancel her deed to Cournoyer, Cournoyer's deed to the Perezes, and the Perezes' mortgage to Chase Federal, on the ground that the original deed to Cournoyer was void for lack of consideration. The trial court found "there was no consideration for the execution of . . . [the deed to Cournoyer] with the exception of love and affection and therefore equitable title and interest in the subject property remained" in Ross. The trial court concluded, however, that "legal title did

pass from Cournoyer to the Perezes because the Perezes were "bona fide purchasers having paid a valuable consideration without notice of any infirmity, and therefore their title to the subject property and interest in the subject property respectively shall stand." Finally the trial court, holding that a constructive trust arose for the benefit of Ross in the proceeds of the sale received by Cournoyer in the sale to the Perezes, entered a judgment for Ross against Cournoyer in the amount of $50,000.

Ross appealed the trial court's denial of her claim for cancellation of the deeds and mortgage, asserting that the Perezes, as purchasers, and Chase Federal, as mortgage-holder, did not have valid interests in the property because there was notice on the face of the deed

to Cournoyer that the consideration was legally insufficient. Therefore, Ross contended, the Perezes were not bona fide purchasers for value without notice and Chase Federal could not claim a valid mortgage on the property. In a per curiam opinion, a three-judge panel of the district court rejected Ross's argument and affirmed the trial court's order. Judge Schwartz dissented. A majority of the district court, however, granted Ross's motion for rehearing en banc. A majority of the en banc court considering the cause on the merits reversed the trial court, holding that under the district court's prior decision in Florida National Bank & Trust Co. v. Havris, 366 So. 2d 491 (Fla. 3d DCA 1979), a deed given to a non-relative in return for love and affection is invalid for lack of consideration. In so holding

the district court found that the Perezes and Chase Federal were on notice to make inquiry concerning the propriety of Ross's deed to Cournoyer since the only consideration it reflected was "love and affection." The district court then remanded the cause with directions to cancel the deeds to Cournoyer and the Perezes and the mortgage to Chase Federal.

The district court sitting en banc was in disagreement as to the standard to apply to determine whether there was conflict between the decision of the initial three-judge panel of the district court in the instant case and the district court's previous decision in Havris. In the initial panel decision, as previously stated, the majority per curiam affirmed the trial court, with Judge Schwartz writing a dissent. The dissent asserted that the majority failed

to properly apply Havris. In Havris, an action was brought by the grantor to cancel a deed to the unrelated grantee on the ground that the deed was not supported by consideration, which was stated as love and affection. As noted, the district court held that "love and affection" did not constitute valid consideration where the conveyance was between persons unrelated by blood or marriage and that the deed was invalid. In the instant case, four judges of the en banc panel [Schwartz, Hendry, Pearson, and Jorgenson] believed that there was "a lack of uniformity" between Havris and the initial panel decision here. These judges believed that Florida Rule of Appellate Procedure 9.331 allowed the district court to sit en banc in this case in order "to maintain uniformity of decisions." Four other judges of the en

banc panel [Nesbitt, Hubbart, Barkdull, and Baskin] believed that the district court had no authority to sit en banc in this case because the controlling facts in Havris and this case were not the same. According to these four judges, there was no direct conflict between Havris and this case under the standard used by the Supreme Court of Florida in exercising its conflict jurisdiction. These four judges concluded that they were obligated to follow the precedent established in Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960), which defined decisional conflicts as:

> (1) the announcement of a rule of law which conflicts with a rule previously announced by this [Florida Supreme] Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a

> prior case disposed of by this [Florida Supreme] Court.

(Emphasis in original emphasis added). One judge of the en banc panel [Ferguson] agreed that Nielsen provided the correct standard to be used by the district courts in determining conflict for en banc purposes, but believed that under that standard conflict existed between Havris and the initial panel decision in the instant case.

Judge Nesbitt, in a dissenting opinion concurred in by four other members of the court, expressed the view that since the en banc rule was established to resolve intra-district conflict which was formerly resolved by the Supreme Court, then the power exercised by the district courts to hear en banc proceedings must be the same as the standard adopted by the Florida Supreme Court in the exercise

of its discretionary conflict jurisdiction. Judge Nesbitt further asserted that any change in the definition of conflict by broadening the present Florida Supreme Court standard would be unconstitutional. Judge Hubbart wrote a dissenting opinion in which he agreeed with Judge Nesbitt and detailed the history of Florida's en banc rule.

We respectfully reject the interpretation that the district courts, in exercising their en banc powers, are limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction. We have held the en banc process to be constitutional and have stated that "[t]he district courts are free . . . to develop their own concept of decisional uniformity." In re Florida Rules of Appellate Procedure, Rule 9.331,

374 So. 2d 992, 994 (Fla. 1979), as modified in 377 So. 2d 700 (Fla. 1979), and as further modified in 416 So. 2d 1127 (Fla. 1982).

In holding the en banc process constitutional, we construed the "three judges shall consider each case" language of article V, section 4, as not restricting the district courts from hearing cases en banc. Our decision was consistent with the decision of the United States Supreme Court in Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326 (1941). In Textile Mills, the United States Supreme Court upheld the inherent authority of the Third Circuit Court of Appeals to establish a procedure for that court to sit en banc without authorization by existing rule, statute, or constitutional provision. See Hearing and Rehearing Cases En Banc, 14 F.R.D. 91 (3d Cir.

1953); Commissioner v. Textile Mills Securities Corp., 117 F.2d 62 (3d Cir. 1940). In construing the statutory provision establishing the federal circuit courts of appeals, the United States Supreme Court concluded that the proviso that there should be a circuit court of appeals in each circuit "which shall consist of three judges" did not prohibit an en banc process and that the court was not restricted to deciding cases with only three judges. In approving this en banc process, the United States Supreme Court commented that it was a means of "more effective judicial administration" and determined that "[c]onflicts within a circuit will be avoided. Finality of decisions in the circuit courts of appeals will be promoted." 314 U.S. at 335. It should also be noted that in a subsequent case the United States Supreme

Court reaffirmed this view and held that th en banc process was an expression of the court's power rather than a party's right. Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1953). In Western the Court held that although a litigant does not have a right to an en banc hearing, the litigant must be given an opportunity to request such a hearing.

The federal en banc process is broader than that provided in Florida Rule of Appellate Procedure 9.331 because, in addition to addressing issues of conflict, the federal process allows the courts of appeal to sit en banc to hear cases of "exceptional importance." When this Court adopted rule 9.331 in 1979, we decided that there was no need to authorize the en banc process in the district courts except for use in the

settlement of intra-district conflict to help reduce the then-existing caseload of the Florida Supreme Court.

The en banc process now authorized for the district courts is designed to help the district courts avoid conflict, assure harmonious decisions within the court's geographic boundaries, and develop predictability of the law within their jurisdiction. Consistency of decisions within each district is essential to the credibility of the district courts. There has been criticism of intermediate appellate courts for their failure to speak with "a single voice of the law." Meador, An Appellate Court Dilemma and a Solution Through Subject Matter Organization, 16 U. Mich. J.L. Ref. 471, 474 (1983). As judges are added to Florida's district courts to meet expanding caseloads, the resulting

increased number of three-judge panels cannot help but increase the number of inconsistent and conflicting decisions. When there is a general rotation of Florida's district court judges among three-judge panels, the increased number of panel combinations compounds the problem. With a five-member court, the number of different panel combinations is ten. With a twelve-member court, however, the number of panel combinations is 220. The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole. The process provides an important forum for each court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within

each court's jurisdiction. We have previously said that

> [u]nder our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole. . . .
>
> . . . .
>
> . . . We would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. . . . Consistency of law within a district is essential to avoid unnecessary and costly litigation.

416 So. 2d at 1128. We expressly granted the district courts broad discretionary authority "to develop their own concept of decisional uniformity" to be able to fully carry out these expressed purposes. 374 So. 2d at 994. In regard to the original panel decision in the instant case and the district court's decision in Havris, we agree with Judge Schwartz that

it would be difficult for the legal profession to harmonize these decisions.

With regard to the merits of the instant case, we agree that, in accordance with the district court's decision in Havris, a deed given to a non-relative in return for "love and affection" is without consideration and is invalid. We further find that since the deed in issue from Ross to Cournoyer expressed on its face that it was for "love and affection" and did not indicate that the grantor and grantee were related by blood or marriage, the Perezes and Chase Federal were placed on constructive notice that the deed may have been invalid and they had the minimal duty to inquire as to whether such a relationship in fact existed between Ross and Cournoyer. See Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1973); Sapp v. Warner,

105 Fla. 245, 141 So. 124 (1932); First Federal Savings and Loan Association v. Fisher, 60 So. 2d 496 (Fla. 1952); Leffler v. Smith, 388 So. 2d 261 (Fla. 5th DCA 1980), review denied, 397 So. 2d 778 (Fla. 1981).

Accordingly, we hold that the district court of appeal, in implementing the provisions of the en banc rule, has the authority to adopt the standard for conflict it believes necessary to harmonize the decisions of its court and avoid costly relitigation of similar issues in its jurisdiction. We approve the majority decision in the instant case to cancel the deeds to Cournoyer and the Perezes and the Chase Federal mortgage, and the remand for further proceedings.

It is so ordered.

McDONALD, EHRLICH and SHAW, JJ, Concur.

ALDERMAN, J., Concurs in part and dissents in part with an opinion. BOYD, C.J., Dissents with an opinion. ADKINS, J. Dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ALDERMAN, J., concurring in part, dissenting in part.

I concur with that portion of the majority opinion which defines the proper scope of review for district courts of appeal in granting rehearings en banc. I dissent, however, from this Court's resolution of the merits of this dispute and its approval of the district court's decision to cancel the deeds to Cournoyer and the Perezes and the Chase Federal mortgage. Rather, I concur with that portion of Chief Justice Boyd's dissenting opinion which addresses the merits of this case.

BOYD, C.J., dissenting.

I dissent to the majority opinion on numerous grounds. First, the so-called "en banc rule" establishes appellate tribunals not authorized by the constitution of Florida. Second, if we are to have en banc reconsideration of district court decisions in order to eliminate intra-district decisional conflict, the concept of conflict for such purpose should be the same as was applied to this Court's conflict certiorari jurisdiction prior to the 1980 constitutional amendment. Third, on the merits of the dispute over the property that Theodores Ross twice conveyed by deed to Peter Cournoyer, I believe that the trial court, the district court, the "en banc" tribunal, and this court have all applied incorrect statements of the law.

As I have pointed out on numerous

occasions, Florida Rule of Appellate Procedure 9.331 has the effect of creating new courts. New courts may not be created by promulgation of a rule of procedure because article V, section 1 provides that only the courts created therein are recognized as courts. Article V, section 4(a) of the Florida Constitution provides: "Three judges shall consider each case and the concurrence of two shall be necessary to a decision." Three district court judges constitute the appellate court under article V, section 4(a). It is highly significant that the word "panel" does not appear in article V, section 4(a). See In re Rule 9.331, Determination of Causes By A District Court of Appeal En Banc, 388 So. 2d 1235, 1236 (Fla. 1980, (Boyd, J. dissenting); In re Rule 9.331, Determination of Causes By A District

Court of Appeal En Banc, 374 So. 2d 992, 994 (Fla. 1979) (Boyd, J., dissenting); see also In re Rule 9.331, Determination of Causes By a District Court of Appeal En Banc, 377 So.2d 700 (Fla. 1979).

Assuming, however, as the majority of the Court has, that the constitutional problems have been properly resolved, I dissent also to the Court's ruling on the question presented by the certified question. Rule 9.331 was first promulgated prior to the 1980 constitutional amendment narrowing the Supreme Court's jurisdiction and withdrawing the power to review decisions on the ground of intra-district conflict. At that time there was an understanding that this new rule would permit the district courts to resolve intra-district conflict as that concept has developed through the jurisdictional decisions of this Court.

"Conflict" as used in the sense of certiorari jurisdictional conflict of decisions was stated to be the equivalent of the ground for seeking rehearing en banc. See In re Rule 9.331, 377 So.2d 700 (Fla. 1979) (Commentary at 701). Thus, when the 1980 amendment was adopted, there was an understanding that the new rule would dovetail nicely with the new constitutional provisions and would enable the district courts to take over the burden of eliminating intra-district conflict in the cases being shifted away from this Court. See In Re Rule 9.331, 416 So.2d 1127, 1127 (Fla. 1982).

The majority opinion broadens the scope of en banc rehearings beyond that originally envisioned. The concept of intra-district conflict should be strictly limited to have the same scope as did "conflict" for purposes of the

exercise of this Court's jurisdiction prior to the 1980 amendment. We should adhere to this strict standard of conflict. Using this standard, I conclude that there was no conflict between the district court's original decision in this case and the case of Florida National Bank & Trust Co. v. Havris, 366 So. 2d 491 (Fla. 3d DCA 1979). Therfore, there should have been no grant of an en banc rehearing.

I come now to the merits of the dispute giving rise to this litigation. In the first place, the basic premise of the argument made on behalf of the late Mrs. Ross, and accepted by the trial, appellate, en banc, and supreme courts, is erroneous as a matter of plain fact. That premise is that the deed did not recite a monetary consideration for the conveyance. Both the initial formally

deficient deed and the later corrective deed executed by Mrs. Ross contained a recitation of monetary consideration. The fact that the latter instrument also contained a superfluous reference to "love and affection" did not render the deed invalid and was not sufficient to put a subsequent purchaser for value on notice of any defect in the grantee's title for lack of a familial relationship between grantor and grantee.

It is said that in Florida a deed, because it operates to pass title under the Statute of Uses, must be supported by consideration in order to be effective. However, doubt has been cast on the accuracy of this statement of the law, one reason being that there is no mention of a requirement of consideration in the Florida conveyancing statutes. See §§ 689.01-.03 Fla. Stat. (1977). While a

promise to convey land must, under essential principles of contract law, be supported by consideration, the preeminent scholar of Florida property law tells us that there is no good reason to require a deed, as a fully executed instrument, to be similarly supported. 1 R. Boyer, Florida Real Estate Transactions § 11.01 (1983). The same scholar also observes that the better rule under modern practice is that where a deed does not recite consideration, it should simply be presumed that a gift was intended. Id. at 180. He adds, however, that "Florida cases can be found to support almost any proposition in this area." Id. at 182 (footnote omitted).

I believe that we should clarify the law and hold that an owner of land has the right to convey it as a gift to anyone he chooses, except of course for

conveyances in avoidance of debts or other legal obligations. For the courts to restrict the class of possible donees of deeds of gift to blood or marital relations burdens the power of alienation and impinges on personal rights of privacy and association. Reference to consideration in land conveyancing has become purely a matter of form, 6A R. Powell, The Law of Real Property, § 888 (rev. ed. 1982), and we should recognize it as such.

But even if it be assumed that consideration is a requisite of the effectiveness of a deed to pass title, there is nevertheless no requirement that, in order to be effective, the deed must recite the consideration received, or that it recite consideration at all. See, e.g., Mexican Crude Rubber Co. v. Ackley, 101 Fla. 552, 134 So. 585 (1930);

Black v. Skinner Manufacturing Co., 53 Fla. 1090, 43 So. 919 (1907). Furthermore, when consideration is recited in a deed, such recitation is conclusive insofar as the effectiveness of the deed to pass title is concerned. See Florida Moss Products Co. v. City of Leesburg, 93 Fla. 656, 112 So. 572 (1927). A grantor who executes a deed reciting consideration is generally estopped to deny that there was consideration. Campbell v. Carruth, 32 Fla. 264, 13 So. 432 (1893). Because recitation of consideration is not strictly necessary, but only a preferred practice for marketability purposes, under the Court's holding any deed not revealing the consideration paid would necessarily require a prospective subsequent purchaser to inquire into the facts outside the title record in order to be sure

that title in fact passed to the grantee. This holding imposes an intolerable burden on the free alienability and marketability of real property.

Boyer tells us that

> the role of consideration in suits for avoiding deeds is an ancillary one, and that the real issue in most cases is simply the attainment of an equitable result. Thus, no consideration, failure of consideration, or even inadequate consideration are circumstances to be considered along with others in deciding whether fraud, undue enfluence, violation of confidence or unconscionable advantage exists.

1 R. Boyer, Florida Real Estate Transactions § 1101 (1983) (footnote omitted).

This observation is highly relevant to the present case because all the courts that have participated have appeared to be concerned about the inequitable enrichment of a so-called "con man" at

the expense of an elderly lady and, now, her estate.

Contrary to the statement of the majority, the facts of the case are not "uncontroverted." The law provides remedies for the wrongful procurement of gifts by fraud, coercion, deceit, or undue influence. See, e.g., Williamson v. Kirby, 379 So. 2d 693 (Fla. 2d DCA 1980); Majorana v. Constantine, 318 So. 2d 185 (Fla. 2d DCA 1975). The law even provides certain presumptions and lightened burdens of proof in view of the difficulties of proof of such matters as fraud and undue influence. Id. Before we call Mr. Cournoyer a "con man" we should be satisfied that the evidence supports such a finding.

It is axiomatic that a court's finding of fact must be based on evidence. It is equally axiomatic that evidence is only

admissible if relevant to the issues framed by the pleadings. The complaint in this case sought cancellation of the deed on the ground that the only consideration was love and affection and the parties were not related. As I have argued above, this should not be enough. The complaint contains no clear, specific allegation of facts showing that the deed from Mrs. Ross to Mr. Cournoyer was procured by fraud, deceit, coercion, or undue influence. It is only pursuant to such an allegation that the lack of a valuable consideration for the conveyance becomes relevant.

Even assuming there had been proper allegations and proof sufficient to constitute grounds for equitable relief in favor of Mrs. Ross' estate and against Cournoyer, there would yet remain the question of whether the title and

security interests of Mr. and Mrs. Perez and their lender, the respondent, should also fail in favor of the estate., This raises the issue of whether the Perezes were good faith purchasers for value without notice of the infirmity affecting the title of Cournoyer. The en banc district court and the majority of this Court take the view that the lack of recitation of monetary consideration in the deed from Mrs. Ross to Cournoyer was sufficient to put the Perezes on notice, or at least inquiry notice, of the invalidity of the deed to their grantor due to the lack of family connection. As I have already said, not only is this view belied by the document itself as shown in the record, it is also undermined by a proper understanding of the law of conveyancing. For relief to be granted the estate against the Perezes there must be

an allegation and proof of some other factual basis for not recognizing their bona fide purchaser status. If the Perezes and their lender had no notice of the purported defect in the title of Cournoyer, then the case would call for the application of the principle that "where one of two innocent parties must suffer through the act of a third person, the loss should fall upon the one whose conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss." Niccolls v. Jennings, 92 So.2d 829, 832-33 (Fla. 1957). Mrs. Ross not once but twice signed deeds of her property to Cournoyer. There was no evidence that she did not know what she was signing or that she did not intend to convey the land. An innocent subsequent purchaser's interest will be protected even when it

is clear that the aggrieved grantor's execution of the deed of conveyance was procured by fraud and deceit. McCoy v. Love, 382 So. 2d 647 (Fla. 1979).

To reiterate the basis of my dissent, I would hold that the original district court opinion, although it affirmed an erroneous trial court judgment, must stand because (1) the en banc rule is unconstitutional and because (2) the en banc rule was improperly invoked because there was no conflict. If there were a proper means for reaching the merits of the case, I would resolve it as outlined above.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 2, 1986

CASE NO. 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

JERRY B. SCHREIBER, Personal Representative of the ESTATE OF THEADORES W. ROSS,

Respondent,

District Court of Appeal, 3d District - No. 80-1213

On consideration of the motion for rehearing and clarification filed by attorneys for respondent.

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, SHAW AND BARKETT, JJ., Concur. OVERTON, McDONALD, and EHRLICH, JJ., Dissent.

IN THE DISTRICT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 79-4132 CA 01

THEADORES W. ROSS,	:	
Plaintiff,	:	
vs.	:	
PETER R. COURNOYER, LUIS PEREZ and GLADYS PEREZ, his wife, and CHASE FEDERAL SAVINGS & LOAN ASSOCIATION,	:	COMPLAINT
Defendants.	:	

Plaintiff, THEADORES W. ROSS sues Defendants and says that:

1. This is an action for cancellation and recission of a Quit Claim Deed, Warranty Deed and Mortgage.

2. During the latter part of 1974 Defendant, PETER R. COURNOYER befriended Plaintiff, an elderly lady approaching ninety (90) years of age at her home in Miami Beach, Florida, after learning that

she was widowed and without relatives.

3. From that time until August 19, 1977, Defendant, PETER R. COURNOYER endeavored to exercise influence and control over the Plaintiff by "handling all her business matters and financial matters" for her with the appearance that he was helping her out.

4. The sole intent of the defendant, PETER R. COURNOYER, in doing so was to obtain full control over the assets and property of the Plaintiff which he ultimately succeeded in doing.

5. Throughout that period of time, Plaintiff's personal property was sold and disposed of by the Defendant, PETER R. COURNOYER, and the Defendant, PETER R. COURNOYER retained the proceeds.

6. Furthermore, throughout that period of time, Plaintiff was placed in various nursing and convalescent homes by

the Defendant, PETER R. COURNOYER.

8. On or about March 4, 1977, Defendant, PETER R. COURNOYER, attempted by way of Quit Claim Deed executed on March 4, 1977, by Plaintiff to obtain possession and control of Plaintiff's residence located at 4580 Michigan Avenue, Miami Beach, Florida. Defendant's attempt failed because the Quit Claim Deed was witnessed only by one individual and it was not a valid Deed, Exhibit A attached hereto and made a part hereof.

9. On or about August 19, 1977, Defendant, PETER R. COURNOYER, once again attempted to correct the subject Quit Claim Deed by receiving a second Quit Claim Deed, Exhibit B attached hereto and made a part hereof. Said Quit Claim Deed, on its face states that said Deed is "being given with consideration being

love and affection."

10. Defendant, PETER R. COURNOYER, was not, nor had he ever been any relative of Plaintiff, either by blood or my marriage.

11. Defendants, LUIS PEREZ and GLADYS PEREZ, subsequently purchased the subject property from Defendant, PETER R. COURNOYER, an executed a mortgage to Defendant, CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION: however, said Defendants can not claim to be bona fide purchasers without knowledge, as the Deed to Defendant, COURNOYER was not a Warranty Deed evidencing a route of title.

12. Defendants, LUIS PEREZ, GLADYS PEREZ and CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION were on further notice that, as the subject Deed to Defendant, COURNOYER, Exhibit B, was for "love and affection" due care should have been used

to determine whether or not said Defendant was related to Plaintiff either by blood or marriage in order to properly determine whether or not consideration given by the Defendant COURNOYER, for the subject property, was in fact sufficient consideration: or the Deed to Defendant, COURNOYER, would be void on its face.

13. Plaintiff submits the subject Deed to defendant, COURNOYER is void and all subsequent interest in the property, steming from the subject Deed are therefor void for failure of consideration.

14. Plaintiff has been damaged in that property was improperly taken from her and disposed of without having received any benefit from the disposition because of lack of consideration.

15. Plaintiff is obligated to pay a reasonable attorney's fee.

WHEREFORE, Plaintiff demands Judgment

for cancellation and recission of the Quit Claim Deed and subsequent Deeds to subsequent purchasers and all other claims or interest on the property on or after March 4, 1977, costs of Court, and a reasonable attorney's fee.

JERRY B. SCHREIBER, C.A.
Attorneyfor Plaintiff

/s/

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 79-4132 CA 04

THEADORES W. ROSS, :

Plaintiff, :

vs. :

PETER R. COURNOYER, LUIS PEREZ and GLADYS PEREZ, his wife, and CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, :

Defendants. :

ANSWER OF DEFENDANT, CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION

COMES NOW the Defendant, CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States of America corporation, and for its Answer to Count I of the Complaint as Amended, states:

1. That this Defendant admits the allegations of Paragraph 1 of Count 1.

2. That this Defendant is without knowledge as to the allegations of Paragraphs 2, 3, 4, 5, 6, and 10 of said Count I, therefore denies same, and demands strict proof thereof.

3. That this Defendant is unable to plead to Paragraph 7 of Count I inasmuch as no Paragraph 7 is set forth on the copy of Count I forwarded to this Defendant by counsel for the Plaintiff.

4. That with regard to Paragraph 8 of Count I, this Defendant admits that there was executed, with one witness, and then placed of public record a Quit Claim Deed dated March 4, 1977, from the Plaintiff to one PETER R. COURNOYER. The remaining allegations of Paragraph 8 are denied.

5. That with regard to Paragraph 9 of Count I, this Defendant admits that there was executed and then placed of public record, a second Quit Claim Deed dated

August 19, 1977, from the Plaintiff to one PETER R. COURNOYER. The remaining allegations of Paragraph 9 are denied.

6. That with regard to Paragraph 11, this Defendant admits that the Co-Defendants, LUIS PEREZ and GLADYS PEREZ, subsequently purchased the property from one PETER R. COURNOYER, and that LUIS PEREZ and GLADYS PEREZ, did thereupon execute a promissory note and mortgage in favor of this Defendant, true copies of which instruments, together with the loan closing documents, are attached hereto, made a part hereof, and designated Defendants Composite Exhibit A. The remaining allegations of said Paragraph 11 are denied in their entirety and should be sricken, pursuant to R.C.P. 1.140 and 1.150.

7. That this Defendat denies the allegations of Paragraphs 12, 13, and 14

in their entirety, and demands strict proof thereof.

AFFIRMATIVE DEFENSES

8. That the Plaintiff has plead no grounds such as would justify the recission of this Defendants mortgage.

9. That a court-ordered recission of such mortgage lien would unjustly enrich the Plaintiff, whose mortgage, held by SUN BANK OF WEST MIAMI, with a balance of principal and accrued interest in the sum of $10,263.90, was discharged by this Defendant at the time of its closing with the Co-Defendants, LUIS PEREZ and GLADYS PEREZ, his wife.

10. That the Plaintiff is guilty of estoppel by Deed by virtue of her execution of Two Quit Claim Deeds in favor of the Defendant, PETER R. COURNOYER.

11. That the said Quit Claim Deeds were recorded, and this Defendant is

entitled to the proection of Chapter 695.01 to bar the claim of the Plaintiff.

12. That this Defendant is claiming by and through the Co-Defendants, LUIS PEREZ and GLADYS PEREZ, who are bona fide purchasers, which status bars the claim of the Plaintiff.

13. That the Plaintiff is guilty of laches, and is likewise estopped from presecuting this action.

WE HEREBY CERTIFY that true and correct copies of the foregoing Answer were mailed this 17 day of April, 1979 to: JOHN H. DUHIG, ESQ., Attorney for Defendants, Perez, Suite 1133 City National Bank Bldg., 25 West Flagler Street, Miami, Florida 33130, and to JERRY B. SCHREIBER, ESQ., Attorney for Plaintiff, Suite 207, Biscayne Bldg., 19 West Flagler Street, Miami, Florida 33130, and to RONALD S. GURALNICK, ESQ., 1928 One Biscayne Twoer, 2 S. Biscayne Boulevard, Miami, Florida 33131.

THERREL, BAISDEN, STANTON, STILLMAN, BROWN & WOOD
Attorneys for Defendant, CHASE FEDERAL

entitled to the proection of Chapter 695.01 to bar the claim of the Plaintiff.

12. That this Defendant is claiming by and through the Co-Defendants, LUIS PEREZ and GLADYS PEREZ, who are bona fide purchasers, which status bars the claim of the Plaintiff.

13. That the Plaintiff is guilty of laches, and is likewise estopped from presecuting this action.

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THERREL, BAISDEN, STANTON, STILLMAN, BROWN & WOOD
Attorneys for Defendant, CHASE FEDERAL

By /s/
Fred R. Baisen, Jr.

IN THE SUPREME COURT OF FLORIDA

No. 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, Petitioner,

vs.

JERRY B. SCHREIBER, as Personal Representative of the Estate of Theodores W. Ross, Respondent.

MOTION FOR RE-HEARING AND CLARIFICATION

COMES NOW, the Petitioner, CHASE FEDERAL SAVINGS AND LOAN ASOCIATION, by and through its undersigned attorneys and pursuant to Florida Rules of Appellate Procedure 9.330(a), moves this Court to re-hear this matter and to clarify its opinion of July 26, 1984 and as grounds would show:

1. In deciding that, "...a deed given

to a non-relative in return for 'love and affection' is without consideration and is invalid", the Court has overlooked Article 10, Section 4(c) of the Florida Constitution which states in part:

"THE OWNER OF HOMESTEAD REAL ESTATE... MAY ALIENATE THE HOMESTEAD BY...GIFT..." The intolerable burden on the free alienability and marketability of real property imposed by this Court is in direct conflict with the Constitution of the State of Florida, which does not require consideration for the alienation of one's homestead.

2. This Court has approved the majority decision of the District Court of Appeal in the instant case cancelling the deeds to Cournoyer dated March 4th, 1977 and August 19th, 1977, the deed to the Perezes dated October 6th, 1977 and the Chase Federal Mortgage dated October

6th, 1977.

3. By virtue of cancelling all deeds and encumbrances subsequent to March 4th, 1977 is this Court also cancelling that certain mortgage deed dated April 25th, 1977 between Peter R. Cournoyer, Mortgagor, and Sun Bank of Miami West, Mortgagee?

4. Said mortgage encumbered the real property, which is the subject of this action, and was recorded on May 5th. 1977, under Clerk's file number 77R107281 in Official Records Book 9670 at Page 629 of the Public Records of Dade County, Florida.

WHEREFORE, Petitioner requests that this Court re-hear argument concerning the Constitution of the State of Florida and clarify the status of the mortgage deed in favor of Sun Bank of Miami West.

WE HEREBY CERTIFY that a true and

correct copy of the foregoing instrument has been furnished by United States Mail to JOHN H. DUHIG, Esquire, Attorney for Perez, Suite 1133, City National Bank Building, 25 West Flagler Street, Miami, FL 33130; to THERREL, BAISDEN, STANTON, WOOD & SETLIN, Esquires, 1111 Lincoln Road, Suite 600, Miami Beach, FL 33139; to JOSEPH A. MCGOWAN, Esquire, 2131 Hollywood Boulevard, P.O. Box 1456, Hollywood, FL 33022, and to JERRY B. SCHREIBER, 207 Biscayne Building, 19 West Flagler Street, Miami, FL 33130, this 8th day of August, 1984.

FERTIG, CURTIS & WAKEFIELD
Co-counsel for Petitioner

/s/
Frank R. Gramling

IN THE SUPREME COURT OF FLORIDA

No. 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

JERRY B. SCHREIBER, etc.,

Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR RE-HEARING AND CLARIFICATION

COMES NOW the Respondent, by and through his undersigned attorney, and files this response to Petitioner's Motion for Rehearing and for Clarification and says that same should be denied, forthwith, for the following reasons:

Fla. R. App. P. 9.330 specifically provides that "The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended." The law and fact referred to in the pending motion were never issues in this case, and thus could not have been "overlooked or misapprehended" by this Court.

1. CONSTITUTIONAL ISSUE: For more than seventy years it has been a rule of this Court that questions not timely raised and ruled upon in the Trial Court, [the applicability of Art. X, § 4(c), Fla. Const.] will not be considered on appeal. Hartford Fire Ins. Co. v. Hollis, 50 So. 985 (Fla. 1909). In this cause, Petitioner had NEVER raised this Constitutional issue in either the Trial Court, nor in the initial appeal in the Third District Court of Appeal, nor in

the En Banc proceedings held in the Third District Court of Appeal.

This issue was not raised by Petitioner in the appeal in this cause until the filing of this Motion for Rehearing.

Furthermore, a review of the "Other Authorities" cited by Petitioner in both its Initial and Reply Briefs discloses that no reference to Article X, § 4(c), Fla. Const. was ever made.

2. THE SUN BANK OF MIAMI WEST MORTGAGE: Exhibit "A" attached hereto and made a part hereof,[16] was taken from Plaintiff's Composite 3, in evidence below. Exhibit "A" is the Satisfaction ofthe Sun Bank of Miami West Mortgage dated October 13, 1977. SUN BANK OF MIAMI WEST IS NOT, WAS NOT, AND HAS

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[16]Omitted from this Appendix.

NEVER BEEN, A PARTY TO THIS ACTION. The reason is obvious. That mortgage was satisfied prior to the inception of this suit...when the PEREZES closed on the subject property. Petitioner further acknowledged this fact on Page 6 of its Initial Brief in which it stated, in part:

> "At the time of closing, October 6, 1977 PEREZ borrowed Thirty-Two Thousand Dollars, secured by a mortgage from CHASE, satisfied the Sun Bank (sic) first mortgage..."

The status of this mortgage was never an issue in this cause.

It is respectfully submitted that Petitioner's Motion for Re-Hearing and Clarification is wholly without merit and should be denied, forthwith.

I HEREBY CERTIFY that a copy of the foregoing was mailed to JOHN H. DUHIG, ESQ., Attorney for Perez, Suite 1133, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; THERREL, BAISDEN, STANTON, WOOD & SETLIN, ESQS., 1111 Lincoln Road, Suite 600, Miami Beach, FL. 33139 and FERTIG, CURTIS & WAKEFIELD, Co-Counsel for Petitioner, Attn: Frank R. Gramling, Esq., 3104 So. Andrews Avenue, Ft. Lauderdale, FL 33316, this 16th day of August, 1984.

JERRY B. SCHREIBER, C.A.
and JOSEPH A. McGOWAN
Attorneys for Respondent,

By /s/
JERRY B. SCHREIBER

SUPREME COURT OF FLORIDA

CASE NO.: 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

JERRY B. SCHREIBER, Personal Representative of the ESTATE OF THEADORES W. ROSS,

Respondent.

RESPONDENT'S MOTION FOR REHEARING AND CLARIFICATION

COMES NOW the Respondent, by and through his undersigned attorney, and files this Motion for Rehearing and Clarification from this Court's decision and opinion dated August 30, 1985 and as grounds would state that this Court has overlooked and misapprehended points of law or fact. Through its decision and opinion, Florida Real Property and Debtor-Creditor laws have been

devastated. For not only will the aged, infirm, and semi-literate members of our Society be subjected to numerous wrongs in the future, but this opinion will also facilitate Debtor's in the commission of fraudulent conveyances to the frustration of Judgment and Lien creditors.

For numerous pages, this opinion has justified the position of the highest Court of this State that no consideration is required for a Deed of real property; however, on pages 21 and 22 of the opinion, the majority goes on to state that consideration is required under certain circumstances. If no consideration is required for a Deed in this State, then no consideration is needed...either it is--or it isn't.

Based on the following issues, the opinion on rehearing dated August 30, 1985 should be withdrawn:

A. THIS COURT OVERLOOKED THE ALLEGATIONS OF FRAUD AND UNDUE INFLUENCE IN THE COMPLAINT.

B. THE VALIDITY OF PETITIONER'S MORTGAGE AS A LIEN ON THE SUBJECT PROPERTY HAS NOT PROPERLY BEEN DISPOSED OF.

C. THE ORDER REMANDING THIS CAUSE TO THE TRIAL COURT CONTAINS ERROR.

D. THE DECISION AND OPINION ON REHEARING RAISES CONSTITUTIONAL ISSUES.

E. THE DECISION ON THE MERITS IS CONTRARY TO PUBLIC POLICY.

ARGUMENT

A. THIS COURT OVERLOOKED THE ALLEGATIONS OF FRAUD AND UNDUE INFLUENCE IN THE COMPLAINT.

The Complaint alleged, in part:

* * *

2. During the latter part of 1974, Defendant Peter R. Cournoyer, befriended Plaintiff, an elderly lady approaching ninety (90) years of age, at her home in Miami Beach Florida, after learning that she was widowed and without relatives.

3. From that time until August 19, 1977, Defendant Peter R. Cournoyer endeavored to exercise influence and control over the Plaintiff by "handling all her business and financial matters" for her with the appearance that he was helping her out.

4. The sole intent of the Defendant, PETER R. COURNOYER in doing so, was to obtain full control over the assets and property of the Plaintiff, which he ultimately succeeded in doing.

5. Throughout that period of time, Plaintiff's personal property was sold and disposed of by the Defendant, PETER R. COURNOYER, and the Defendant PETER R. COURNOYER retained the proceeds.

6. Furthermore, throughout that period of time, Plaintiff was placed in various nursing and convalescent homes by the Defendant, PETER R. COURNOYER.

* * *

14. Plaintiff has been damaged in that property was improperly taken

from her and disposed of without having received any benefit from the disposition because of lack of consideration.

* * *

On the second day of Trial held on February 11, 1982, transcript "T-2", beginning at page 35, Mr. Cournoyer testified in response to relevant and material questions:

Q. Do you know Mrs. Theodore Ross, the lady at my left?

THE WITNESS: I rely on the Fifth Amendment rights.

THE COURT: Are you following the advice of your counsel in refusing to answer the question on the ground that it may tend to incriminate you?

THE WITNESS: Yes, your Honor.

As correctly observed in page 9 of its Decision on Rehearing: "The Judgment

against Cournoyer in favor of Mrs. Ross . . . was not appealed and its an legal correctness is not an issue before us.

The entire Complaint, to which all Parties answered, is contained in Exhibit A, attached hereto and made a part hereof.[17]

B. THE VALIDITY OF PETITIONER'S MORTGAGE AS A LIEN ON THE SUBJECT PROPERTY HAS NOT BEEN PROPERLY DISPOSED OF.

The only Petitioner in this Action is Chase Federal Savings and Loan Association. They are the mortgagees on the subject property. The Perezes, who are not Parties to this Appeal [as correct-ly noted on page 8 of this Decision] failed to timely file their Appeal with this Court, and their Cause,

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[17]Appendix D of this Appendix.

Case No. 63,025, was dismissed for lack of jurisdiction pursuant to Respondent's Motion, rehearing denied, June 30, 1983, as reported in 443 So.2d 980.

Respondent, in his Answer Brief, under Issue I of the Argument, timely raised the issue that a mortgage "predicated upon a void Deed is like-wise void...". Jordan v. Landis, 175 So. 241,247 (Fla. 1937): See also Shuman v. State, 56 So. 694, 696 (Fla. 1911). For the purpose of this Appeal, the legal correctness and validity of the Deed is not an issue before this Court. What is at issue before this Court is the validity of Petitioner's mortgage as a lien on the subject property, solely.

Furthermore, the Perezes were necessary parties to this Appeal but they, at no time, were joined. According to precedent as observed by the majority,

with respect to the judgement against Cournoyer [page 9 of this opinion on rehearing], this Court would continue to hold that it has no Jurisdiction over the Perezes. Barry v. Barnett, 79 Fla. 562, 84 So. 540 (1920) goes even further to state that, on its own Motion, this Court should Dismiss the Appeal in this Cause. See also Ravinowitz v. Houk, 100 Fla. 44, 129 So. 501 (1930); Steele v. Miami Transit Co., 34 So.2d 530 (Fla. 1948). Since there cannot be either a Mortgage or a Mortgagee without a Mortgagor, on the merits, this Appeal is now moot and should be dismissed; or in the alternative, this Court should hold that since the Petitioner never joined the Perezes in this Appeal, the law of the Case as to the Perezes is established by the Decision of the District Court of Appeal for the Third District of Florida. As

there cannot be either a Mortgage or a Mortgagee without a Mortgagor, Chase Federal Savings and Loan Association's mortgage must be cancelled.

C. THE ORDER REMANDING THIS CAUSE TO THE TRIAL COURT CONTAINS ERROR.

In the Trial Court and the District Court of Appeal, all par-ties were present and both Courts had Jurisdiction over the Mortgagor and Mortgagee. Therefore, the central question presented for the courts' consideration was the validity of the deed. As stated above, in this proceeding on Appeal, the Mortgagors-Purchasers are not Parties [again, this fact was correctly noted on page 8 of this opinion]. On page 23 of this opinion, the order remanding this case to the trial court provides for "[E]ntry of a

judgement for petitioner-defendant Chase Federal Savings and Loan Association". However, it is not clear just what this judgement is for. The sole issue before this Court is the validity of a mortgage as a lien on property on which the Mortgagors have no interest. This Court, in Hay v. Issets, 125 So. 237, 240 (Fla. 1929): stated:

> When an Appeal has been taken and parties who have a vital and pecuniary interest in the Decree appealed from are not made parties to the Appeal, this Court is without Jurisdiction of such parties and cannot determine their rights as affected by the Final Decree... (Emphasis added).

The Perezes are not Parties to this Appeal. Again, their Appeal was Dismissed for lack of Jurisdiction by this Court, rehearing denied, June 30, 1983.

As can be seen from Exhibit B,[18] attached hereto and made a part hereof, the Perezes executed a document known as "Statement". This document is also a part of the record on Appeal (Plaintiff's Exhibit 3A). ¶5 of this "Statement" acknowledges, "The legal services being performed in connection with this loan are on behalf of the Lendor and not on behalf of the Borrower". The testimony at Trial reflects the Perezes, on the advice of their New Jersey lawyer, had no attorney (T-2, testimony of February 11, 1980, at page 54). Petitioner's loan records, in evidence, acknowledge that Chase's attorneys were not in any way representing the Perezes. All parties to the Deed of October 1977 could have complied with the existing law in the

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[18]Omitted from this Appendix.

Third District of Florida, but they chose not to. The purchasers could have retained counsel for the real estate transaction, but they chose not to. In oral argument, there was concern as to the collectibility of the Perezes. The current tax records of Dade County reflect that the Perezes own numerous commerical real property sites in Dade County, and accordingly they are quite collectible.

From the foregoing issues and law, and as the policy of courts is to stand by precedent and not to disturb settled points of law, there is no doubt that the order on remand should direct the trial court to enter a "judgement for the respondent-plaintiff Jerry B. Schreiber, Personal Representative of the estate of Theadcres W. Ross, as to the ownership of the real property and to cancel the

mortgage in favor of petitioner-defendant Chase Federal Savings and Loan Association".

D. THE DECISION AND OPINION ON A REHEARING RAISES CONSTITUTIONAL ISSUES.

1. EXPANDING THE CONSTITUTIONAL MEANING

As stated by this Court, at page 20 of the opinion, "Article X, section 4 of the Florida Constitution, as revised in 1968, provides in pertinent part: 'The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgagage, sale, or gift . . . '".

This Court has now translated this phrase to mean that "there is no requirement that the grantee be related to the grantor by consanguinity or marital

affinity". This is because there is nothing in the 1968 constitution which appears to limit this provision authorizing the owner to give away the property. As this Court further reasons, at page 21 of the opinion:

> [I]f a homestead, which it is the policy of the law to protect and preserve in the family, may be conveyed away be deed of gift, we see no reason why the same rule should not apply to all property. We therefore hold that there does not need to be consideration in order for an owner of land to convey it by deed to another.

Without a doubt, this Court, and the mandates of Constitutional law, without exception, have stated that the State Constitu-tion of Florida is not a grant of power but a limitation upon power. In re Apportionment Law, Senate Joint Resolution RES. No. 1305, 263 So.2d 797 (Fla. 1972). Furthermore, as this very

Court stated in State v. Barquet, 262 So.2d 431, 433 (Fla. 1972):

> Governmental powers are divided into the Executive, Legislative and Judicial Branches. The lawmaking function is the chief Legislative Power. . . . The Judicial Branch is Constitutionally forbidden from exercising any powers appertaining to the Legislative Branch (Fla. Const., Art.II,§3). . .

Furthermore, this Court has specifically stated in In Re Apportionment Law, Senate Joint Res. No. 1305, Supra, at 806:

> Hence this Court in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of the Government, but will only measure the acts done with the aspect of the Constitution.

In an attempt to justify its rationale in holding that "There does not need to be consideration in order for an owner of

land to convey it by Deed to another person" (opinion p.21), has not this Court encroached upon the domaine of the Legislature? Where there is no specific prohibition in the Constitution of this State to prohibit the Legislature from enacting laws with respect to consideration for a Deed of property, the Legislature, in its wisdom, can do so. Thus far, in the seventeen years since the adoption by the voters of the 1968 revision to the Florida Constitution, the Legislative Branch has not enacted any Statute stating that there does not need to be consideration in order for the owner of land to convey it by Deed to another person. It is respectfully submitted that as the Legislature has not so acted, it is not proper for the judiciary to do so.

2. INTERPRETATION OF ARTICLE X, SECTION 4(c).

An examination of Article X, section 4(c) does not support the translation that the inclusion of the word "...gift..." singularly or in context of the entire section was meant to radically change real property law in Florida.

If the judiciary finds the meaning of a statute or a section of a constitution ambiguous or unclear, the normal procedure is to determine the legislative intent. The United States Supreme Court has continually relied on the Congressional history. Powell v. McCormack 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); and Bailey v. Drexel Furniture Co., 259 U.S. 20, 42

S.Ct. 449, 66 L.Ed. 817 (1922).

Had this been done concerning Article X, section 4(c), it would become imminently clear that the majority's decision was totally different from the legislative intent.

From the inception of this amendment, the intent of this revision as stated by former Supreme Court Justice, Mr. B.K. ROBERTS, was to be:

> "[T]hat where a man and his wife had purchased and worked out a home, and for reasons of their own they see fit to leave it to one of a number of children, they should have a right to do so."

Excerpt of the transcript of preliminary proceedings 1966-67 Florida Constitution 1968, page 258, et. seq., Exhibit C[19] attached hereto and made a part hereof.

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[19]Appendix J of this Appendix.

At page 260 of the transcript (Ex. C), the question of consideration for a Deed arose, and Mr. Roberts responded:

> "I incline to the view that if a conveyance is made without a consideration, that it would not be valid." (Emphasis added).

The intent of the framers of this revised section of the Florida Constitution was that the owner of homestead and his wife could make a gift of their homestead property to "one of [their] children. Of course, the consideration reflected and on the conveyance and on the deed would, therefore, be "good consideration" which defined as:

> "Consideration based on a natural duty which exists between relatives by blood or marriage." Words and phrases "Good Consideration" (1972).

The clear intent of the framers of

this Amendment was to maintain the "gift" within the family and not to expand its meaning as has been done by the majority of this Court.

3. ARTICLE X, SECTION 4(c) IS UNCONSTITUTIONAL AND INVALID.

It has already been demonstrated that one, there is a serious question raised by the expansion of the amendment and two, such expansion did not follow legislative intent. Either independently or together, these issues support the withdrawal of this Court's opinion. However, this initial examination now raises one additional area for consideration; that being, the constitutionality of Article X, Section 4(c).

Just as the Constitution of the United States provides for a procedure for revision, so too does the Florida

Constitution (as it did in the 1885 Florida Constitution).

Article XVII, section 2 of the 1885 Florida Constitution established procedures by which that Constitution could be revised. It provided, in part, that at a general election the revised constitution shall be submitted to the electors of the State, for approval or rejection. Since a majority of the electors voting on the revision of the Constitution shall approve same, the Revised Constitution shall take effect immediately upon such approval by the electors.

As noted in the dissent of Overton, J., (Opinion p.27)[20], the official analysis of the proposed Constitution submitted by the Legislature to the voters for ratification at the November

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[20]Appendix A, page 67a of this Appendix.

5, 1968 General Election, explained the change to the provision in issue, as follows:

> [T]he right of a married owner to directly transfer by deed, title of the homestead to himself and his spouse as an estate by the entirety should be given constitutional status. Also, the Legislature would be directed to provide a method of alienating or encumbering homestead property where either the owner or spouse is incompetent.

Draft of proposed 1968 Constitution, Article X, section 4, analysis of proposed revision (July 20, 1968).

Justice Overton recognized the disparagement between what the electorate voted on and the impact of the wording of this section of the Constitution. If this Section of the Constitution can be interpreted to mean that any "gift of land" or a "gift of homestead may be made to one other than a family member", then

this section is clearly ambiguous; and the electorate of this State were never properly advised as to the true meaning of this constitutional change. If this is so, would not such a revision violate the proce-dures for constitutional revision? The answer must be in the affirmative as none of the electorate has had an opportunity to approve or disapprove such a major, radical change involving a person's inherent rights as required by the 1885 Florida Constitution.

Is Article X, section 4(c) constitutionally valid? From the foregoing, the answer is "No".

4. DENIAL OF PROCEDURAL DUE PROCESS.

A further constitutional issue is the denial of procedural of due process. The

majority of this Court decided the merits of this Case, on an issue that was not presented or addressed by the Trial Court, the District Court of Appeal, or this Court in the First Appeal. This was timely and specifically pointed out in Respondent's Reply to Petitioner's Motion for Rehearing.

Petitioner raised an entirely new point of law and Respondent was not able, through the full use of the adversary system, to fully address the issue. In fact, even now, with the time constraint imposed upon Respondent for filing this Motion for Rehearing Respondent is indeed prejudiced for he is not only cramped for time in order to frame his Motion, but no argument was ever addressed or presented to this Court or the trial court on a major Constitutional issue except on rehearing. In giving credence to this

point in Petitioner's Motion for Rehearing, this Court has virtually stated that each and every precident prohibiting such an act, as enunciated by this Court is now meaningless. A portion of this Court's cases which are now "bad law" are: Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), In re Beverly, 342 So.2d 481, 97 A.L.R.3d 767 (Fla. 1977), Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962), Carillon Hotel v. Rodriguez, 124 So.2d 3 (Fla. 1960), South Dade Farms, Inc. v. Peters, 107 So.2d 30 (Fla. 1959). Stein v. Brown Properties, Inc. 104 So.2d 495 (Fla. 1958), Clark v. Osceola Clay & Top Soil Co., 99 So.2d 869 (Fla. 1958), Quick v. Leatherman, 96 So.2d 136 (Fla. 1957), Mariani v. Schleman, 94 So.2d 829 (Fla. 1957), City of Lake Worth v. First Nat. Bank in Palm Beach, 93 So.2d 49 (Fla.

1957), Condrey v. Condrey, 92 So.2d 423 (Fla. 1957), Love v. Hannah, 72 So.2d 39 (Fla. 1954),, Atlantic Coast Line R. Co. v. Mack, 57 So.2d 447 (Fla. 1952), Foley v. State ex rel. Gordon, 50 So.2d 179 (Fla. 1951), Jones v. Neibergall, 47 So.2d 605 (Fla. 1950), Southern Liquor Distributors v. Kaiser, 7 So.2d 600, 150 Fla. 52 (Fla. 1942).

However, it is respectfully submitted by the undersigned that the above cannot be the position of this Court. For to permit new issues to be raised for the first time on appeal, or in this case on the fourth rehearing in this cause, is to deny full use of the adversary system, and a denial of due process.

E. THE DECISION ON THE MERITS IS CONTRARY TO PUBLIC POLICY.

Even in view of the foregoing, a most crucial issue that has been overlooked and misapprehended is the impact upon the public welfare Florida and its residents. As observed by Justice Overton, in view of this Court's holding, those citizens of this State in most need of Government support and protection would suffer.

Consider the following:

> In 1945 this Court in McElroy v. Gay, 22 So.2d 154 (Fla. 1945) set aside a conveyance from an elderly man to a young girl for failure of consideration. As can be seen from the facts, she induced a conveyance to her on the promise of marriage. This Court reversed the dismissal of the Complaint and the matter was remanded to the Trial Court with directions that the Case proceed. While the allegations of the Complaint indicate there was a promise to marry and that was consideration for the Deed, in view of this Court's decision, the Defendant could easily argue that there is no consideration required for a Deed of

> Land as he made a gift to her of an undivided half-interest in realty because she was pretty and nice, and that she would never promise to marry such an old man.

Would McElroy be decided the same way today?

Consideration for a deed of land is a hurdle that the perpetrator of a fraud must overcome. It is this hurdle, which is tangibly demonstrable from the face of the deed. It becomes a stumbling block for the con-man, as well as protection for the victim. For regardless of testimony and a "swearing match" in the trial court, the fact still remains that the Stamps on the Deed and the Abstract of Record clearly reflect that no consideration was given for the transfer.

It is acknowledged that the majority opinion does not repudiate fraudulent conveyances in Florida, but what the

majority opinion does do is remove one of the most crucial indicia or "badges" of fraud. As stated by this Court in Cleveland Trust Company v. Foster, 93 So.2d 112 (Fla. 1957) at 114:

> The facts which are recognized indicia of fraud are numerous, the most important being the insolvency or indebtedness of the Transferrer (sic), lack of consideration for the conveyance, retention by the debtor of possession of the property or relation-ship between the Transferrer(sic) and the Transferee, the reservation of benefit to the Transferrer (sic), dependency or threat of litigation, secrecy or concealment, and the transfer of the debtor's entire estate. (Empahsis added).

In 1980 there were 1,700,000 persons living in Florida aged 65 years and older. This number is projected to be 2,400,000 by the year 1990. The percentages of elderly living alone in Florida are:

Ages 60 - 74 . . . . . 18.1%.

Ages 75 - 84 . . . . . 30.8%.

Ages 85 and older . . . 30.6%.

Furthermore, the rate of Florida residents 65 years and older has increased from 1970 to 1980 by 17.3%. By the year 1990, these numbers will increase by 19.4%. A further dramatic statistic is that the population of individuals 85 years and older is projected to increase from 1980 to the year 2000 by 203%. In 1980 there were 117,342 such persons. By the year 2000, this number will increase to 355,649. The elderly population is the fastest growing population in our State. It is interesting to note that the majority of the elderly are female. The male/female ratio of elderly over 75 years of age in 1970 was 82 male per 100 female; in 1980 it was 70 male per 100

female; in 1990 this ratio is projected to be 65 male per 100 female; and by the year 2000 this ratio is projected to be 62 male per 100 female.[21] Fraud on the elderly is an acknowledged fast growing social problem in this State. With the increase of this State's elderly population, this problem will only increase.

Justice Overton in his dissent labeled a majority opinion as the "gigolo - mistress relief rule". Another apt description of this rule could be the "con-man land fraud rule". Using the facts of this Case and a little imagination, the con-man can always insulate himself from any claims of undue influence or a fraudulent transaction by simply forming a corporation. Once the

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[21]Source: Governor's office, State of Florida, "Pathways To The Future", December, 1984.

for no consideration from the victim, a perfectly valid transaction under the majority's opinion, he merely records a second Warranty Deed from himself to his corporation on the very same day. Thereafter, the corporation is clearly able to convey property to any individual and that purchaser would become a bonified purchaser for value without notice. The property would be fully conveyed and no claim could ever be made to set it aside.

The impact of the majority's opinion on Florida society not only affects the elderly, but similarly affects the minorities and semi-literate residents of our State. As a natural consequence of this decision, at least with respect to the elderly who have been defrauded of

State would surely grow. Considering the above statistics on the elderly, the State's financial burden of supporting and caring for this once self-sustaining population can only increase. Thereafter the natural result is an increase in taxation in order to care for those people who could be thrown on a welfare status.

As was even reflected in the testimony of Mrs. Ross (at T-1:27 through 76, given on January 7, 1980), she, too, was placed in various nursing homes after Cournoyer conned her out of her personal and real property. Having no source of income other than Social Security, it is obvious that the state welfare system would have had to take her. However, a sympathetic stranger took her in and cared for her for no charge in her Adult Congregant Living Facility.

Living Facility.

Since the en banc decision was filed and published, the Respondent, a member of the Florida Bar, has had a second case in which a lady in her 60's was conned out of her home by her neighbor. This lady was an alcoholic, and her neighbor said it would be much easier for her, the neighbor, to make monthly mortgage payments on the property and that she, the neighbor, would be better able to ensure that all payments and taxes were paid if the property were deeded in her name. That way, she, the neighbor, would receive all the bills and tax notices. The property was deeded "for love and affection" and for no consideration. From the Deed, I identified the neighbor's attorney and advised him of the Third District Court of Appeal en banc decision in this cause. The neigh-

rightful owner, shortly thereafter.

However, the foregoing could not happen, and cannot happen, in light of this Court's decision on rehearing.

The judicial process and the judicial institutions of the State exist for the benefit of its residents and citizens. It is respectfully submitted that the Highest Court of this State should not turn its back on a fast growing segment of the populous as well as the minorities that are coming into this State on a daily basis for residency, many of whom are hard working and self-sustaining, though semi-literate.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Motion for Rehearing gives five major independent points for consideration by this

dent points for consideration by this Court. Once considered, it is indeed correct and proper that Respondent's Motion for Rehearing be granted, and that the Opinion of August 30, 1985 should be withdrawn.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing was mailed the 23rd day of September, 1985 to Therrell, Baisden, Stanton, Wood and Seitlin, 1111 Lincoln Road, Suite 600, Miami Beach, Florida 33139, Frank Gramling, Esq., 750 S.E. 3rd Avenue, Suite 200, Ft. Lauderdale, Florida 33316.

JERRY B. SCHREIBER, C.A and
JOSEPH A. MCGOWAN, ESQ.
Attorneys for Respondent

By /s/
Jerry B. Schreiber, Esq.

SUPREME COURT OF FLORIDA

Thursday, March 6, 1986

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	
Petitioner,	:	CASE NO. 63,017
vs.	:	
JERRY B. SCHREIBER, PERSONAL REPRESENTATIVE OF THE ESTATE OF THEADORES W. ROSS,	:	
Respondent.	:	

Motion for Leave to Intervene by Luis Perez and Gladys Perez is hereby denied.

Respondent's Motion to Enforce the Mandate is hereby denied.

AFTERNOON SESSION

MR. ROBERTS: Mr. Chairman and Members of the Commission, this is another committee amendment. It was the view of the human rights committee that where a man and his wife had purchased and worked out a home, and for reasons of their own they see fit to leave it to one of a number of children. they should have the right to do so.

For that reason the purpose of the amendment is to remove from the current draft the language: "The homestead shall not be subject to devise if the owner is survived by children." I'd like to yield now to Mr. Earle, who I believe was the father of this amendment.

MR. TAYLOR: Mr. Chairman, will the gentleman yield?

MR. ROBERTS: Yes, sir, I will.

MR. TAYLOR: What would be your

thought as to the proper definition of that word "children," minor children or adult children, or what is your thinking on that?

MR. ROBERTS: Just children, Judge. And I tell you what the committee discussed. Ofttimes as we know there will be a family of say eight or nine, ten children. Somewhere in the deal one child gets caught with looking after Papa and Mama during their last 15 or 20 years. The other children live their own lives, and maybe it's a daughter or son, but they stay there day after day, they look after Papa's needs and Mama's needs. Then in the sunet years of their life, if that old couple wants to leave their little home to that child, who has sustained them in their greatest hour of need, we question the right in good conscience for the other children to come

in and claim that it is an unlawful disinheritance.

So for that reason, answering your question, Judge Taylor, it was our thought that the owners of a homestead should have the freedom of disposition in that manner if they saw fit.

MR. STALLINGS: Will the gentlemen yield?

MR. ROBERTS: I will, sir.

MR. STALLINGS: Judge, isn't there also some case law to the effect that inter vivos they can convey the homestead to one of these children who has taken care of them, who has done all of this in their sunset years, isn't there case law to that effect?

MR. ROBERTS: That they can or cannot?

MR. STALLINGS: That they can.

MR. ROBERTS: They cannot.

MR. STALLINGS: On an inter vivos

devise rather than testamentary, which of course is not, but can't they do that now? I recall some case that said that, unless it's been overruled.

MR. ROBERTS: I incline to the view that if a conveyance is made without a consideration, that it would not be valid.

MR. STALLINGS: I'm for your amendment, but I was just trying to bring out if there isn't some sort of case law precedent for doing that.

MR. ROBERTS: Well, I'd have to, to be honest, I'd have to tell you that I have not briefed the question recently, so I am not in a position to answer.

85-1810 (3)

Supreme Court, U.S.
FILED
MAY 9 1986
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CASE NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1985

JERRY B. SCHREIBER,
Personal Representative
of the
ESTATE OF
THEADORES W. ROSS,
Petitioner,

vs.

CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI FROM THE
SUPREME COURT OF FLORIDA

OPPOSING BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I

Whether Petitioner has been deprived of real property and due process as guaranteed in the Fifth and Fourteenth Amendments of the Constitution of the United States by the Judgment of the Supreme Court of Florida?

II

Whether the Supreme Court of FLorida improperly usurped the power of the Legislature when it removed the common law protection in the conveyance of real property?

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STATEMENT OF CASE

Beyond the statement of the case made by Petitioner, Respondent deems the following as necessary to correct any inaccuracy or omissions in Petitioner's statement.

The Trial Court held that the PEREZES were not on notice of any infirmity in the earlier deeds between ROSS and COURNOYER. That Court held that the PEREZES, having paid a valuable consideration, were subsequent bona fide purchasers of the property from COURNOYER. The Third District Court of Appeal of Florida initially per curiam affirmed the Trial Court decision.

The Third District Court of Appeal of Florida subsequently on motion for rehearing en banc granted, reversed

itself holding that love and affection could not be a valuable consideration between two non-related parties and that the PEREZES were therefore on notice and could not claim their status as bona fide purchasers for value.

> "We emphasize the limited nature of our ruling, which is determined by the express 'love and affection' statement -- the epitome of a 'red flag' -- on the face of the deed. If it had contained only the usual recital of a 'good and valuable consideration,' Mrs. Ross could not have asserted, and a subsequent purchaser would, without more, not have been on notice that the consideration was legally insufficient and the deed invalid on that ground. See Mexican Crude Rubber Company v. Ackley, 101 Fla. 552,134 So. 585 (1930); Daniell v. Sherrill, 48 So.2d 736 (Fla. 1950)." Schreiber v. Chase Federal Sav. and Loan Ass'n., 422 So.2d 911 (Fla. 3rd DCA 1982) at page 913, footnote 3.

The Florida Supreme Court in

its initial review of this matter, Petitioner's Appendix B, stated:

> "The specific issue is whether a deed which shows on its face that the consideration is "love and affection," but does not show on its face that the grantor and grantee are related by blood or marriage, places a subsequent grantee on notice that the deed may be void."

The Florida Supreme Court resolved that issue by asserting, Petitioner's Appendix B:

> "With regard to the merits of the instant case, we agree that, in accordance with the District Court's decision in Havris, (Florida National Bank & Trust Co. v. Havris, 366 So.2d 491 (Fla. 3rd DCA 1979), a deed given to a non-relative in return for "love and affection" is without consideration and is invalid."

Upon rehearing, the Florida

Supreme Court in its subsequent opinion, Petitioner's Appendix A, stated:

> "The specific issue is whether a deed which shows on its face that the consideration is "love and affection", but does not show on its face that the grantor and grantee are related by blood or marriage, is effective to pass title."

This time, the Florida Supreme Court resolved the issue by asserting, Petitioner's Appendix A:

> "We hold that the deed was valid and effective to pass legal title notwithstanding that there was no valuable consideration paid, and the grantor and grantee were not related."
>
> "It follows from our holding that the estate of Mrs. Ross is not entitled to have the deed set aside on the ground that it was void. Nor does the Estate have any equitable claim superior to that of the subsequent purchasers and mortgagee on the ground that they had notice of the defect in

> the deed, because there was no defect in the deed."

It is from this final opinion of the Court of last resort for the State of Florida that Petitioner seeks review.

SUMMARY OF ARGUMENT

The issues presented for review by this cause question the requirement of consideration as affecting the validity of a conveyance of real property within the State of Florida, and whether a lack of consideration could serve as notice, warning a subsequent purchaser to inquire as to the blood or marital affinity between the grantor and grantee. This cause has been reviewed four times by the Appellate Courts of Florida and does not present a substantial federal quetion. As there are adequate and independent State grounds for the opinion, there is no reason presented for this Court to exercise its discretionary review of the same.

ARGUMENT I

THE PETITIONER HAS NOT BEEN DEPRIVED OF REAL PROPERTY AND DUE PROCESS AS GUARANTEED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE JUDGMENT OF THE SUPREME COURT OF FLORIDA.

Petitioner argues jurisdiction vests pursuant to Title 28 USC, Section 1257(3) by virtue of a denial of constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution. Petitioner argues that the Florida Supreme Court Opinion which purportedly expanded a 1968 Amendment to the Constitution of that State, and which purportedly heard an issue raised for the first time on a Petition for Rehearing, effected the denial. Petitioner asserts that while the Supreme Court of Florida did not expressly rule on federal

constitutional rights, that an actual determination by the State Court is not required in order for jurisdiction to vest. Petitioner asserts that the State Court decision, purportedly resting on State grounds, does not preclude this Court from discretionary review.

The Constitutional and Statutory provisions, which Petitioner asserts this case involves, are restricted to Article X, Section 4(c) and Article II, Section 3 of the Florida Constitution as revised in 1968, and Florida Statute Section 2.01(1983). On its face, the Petition for Writ of Certiorari does not present a federal question.

While neither controlling nor

fully measuring this Courts' discretion, Supreme Court Rule 17 indicates the character of reasons that will be considered in governing review on certiorari. The review of a State Court decision must find that the State Court of last resort has decided a federal question in a way in conflict with a State Court of last resort or Federal Court of Appeal or that the State Court has decided an important question of federal law. The case which Petitioner seeks review of by this Court, presents neither.

As shown by tracing the lower court decisions, the Trial Court set the issue which, with collateral issues, was to be reviewed on four separate occasions by the Appellate Courts of Florida. As

set forth in Respondent's Statement of the Case, the issue was initially one of notice. The Trial Court and Appellate Courts all approached this issue of notice and resolved it without resorting or referring to any federal laws of substance or procedure.

In responding to the issue of notice, the Florida Supreme Court also resolved the issue of the validity of a deed without consideration. That opinion, which was contrary to an earlier Third District Court of Appeal of Florida Opinion requiring consideration, Havris, supra, and the earlier Third District Court of Appeal's Opinion in Schreiber v. Chase Federal, supra, presents no issue which would invoke the discretionary jurisdiction of this Court.

Neither the resolution of the issue of notice nor the resolution of the issue of consideration raise a substantial federal question.

While the issues dealing with notice and with the validity of a deed without consideration have been raised at each level of the proceedings below, the Petitioner did not raise the federal questions purportedly presented here until a petition for rehearing. The federal questions were not entertained by the Florida Supreme Court and come too late to be entertained by this Court.

ARGUMENT II

THE FLORIDA SUPREME COURT DID NOT IMPROPERLY USURP THE POWER OF THE LEGISLATURE NOR DID IT REMOVE THE COMMON LAW PROTECTION IN THE CONVEYANCE OF REAL PROPERTY.

Respondent is unaware, as was the majority of the Florida Supreme Court, of any statutory or common law protection or requirement asserting that a valid conveyance of real property, with no monetary consideration, can only be made between a grantor and grantee who are related by blood or marital affinity. In fact, neither Sections 689.01, 689.02, 689.03 nor 689.09 Florida Statutes (1977) contain any legislative mandate or mention of a requirement of consideration for a conveyance of real property to be valid.

Respondents suggest that a foundation of this Court is based on not reviewing opinions of State Courts when those opinions rest on non-federal grounds. Respondent asserts that adequate and independent State grounds exist within the well reasoned opinion of the Florida Supreme Court (Petitioner's Appendix A) and that this Court should not exercise its discretionary review of the same.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Opposing Brief of Respondent were mailed, postage prepaid, pursuant to Supreme Court Rules 28.3 and 28.4 to: Jerry B. Schreiber, Esq., 207 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 and Joseph McGowan, Esq., Route 3, Box 3392, Blue Ridge, Georgia 30513, this 5th day of May, 1986.

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STATE OF FLORIDA)
)ss
COUNTY OF DADE)

Personally before the undersigned authority appeared Frank R. Gramling, who, under oath and from his own personal knowledge, states that the foregoing Certificate of Service is true and correct. Dated May 5, 1986.

Nancy J. Chapnick
Notary Public, State of Florida at Large.

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires April 19, 1989
Bonded thru Maynard Bonding Agency